TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1859.

No. 189. 87

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 24, 1859.

(16,893.)

(16,898.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 313.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Page.
Caption	1
Transcript from the supreme court of the District of Columbia	1
Caption	1
Declaration	1
Affidavit of Charles J. Cumberland	3
Plea	3
Joinder of issue	4
Memorandum: verdict for plaintiff	4
Judgment	4
Memorandum: term prolonged to settle bill of exceptions	4
Appeal and waiver of citation	5
Memorandum: appeal bond filed	5
Bill of exceptions made part of record	5

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Page.
Bill of exceptions 5
Testimony of Charles Emmert Cumberland 6
Charles J. Cumberland 15
Albert P. Motley 16
John Josiah Faunce 17
William P. Corcoran 18
Frances Campbell 18
Police regulations (extracts from) 18
Police regulations (section 15) 18
Testimony of George H. Brown 19
Charles R. Bush 21
Charles H. Maddox 23
Robert Deavers 24
Edward F. Roby 24
John R. Thomas 26
John T. Phillips 27
B. J. Beal 29
Charles J. Cumberland (recalled) 30
Motion to instruct jury to return verdict for defendant 30
Plaintiff's prayers 30
Defendant's prayers 31
Court's charge to jury 33
Exhibit A (map) 42
Judge's certificate to bill of exceptions 42
Clerk's certificate 42
Minutes of argument 43
Opinion 43
Judgment 50
Order allowing writ of error 50
Bond 50
Writ of error 51
Citation and service 52
Clerk's certificate 52

In the Court of Appeals of the District of Columbia.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Appellant,
vs.
CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, CHARLES J. CUMBERLAND.
No. 778.

a Supreme Court of the District of Columbia.

CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, CHARLES J. CUMBERLAND,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.
No. 37720. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed Mar. 12, 1895.

In the Supreme Court of the District of Columbia, the — Day of March, 1895.

CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland, Plaintiff,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant.
At Law. No. 37720.

The plaintiff, who is an infant 12 years of age, by his next friend, Charles J. Cumberland, sues the defendant, for that whereas, the defendant is and was, to wit, on the 10th day of December, A. D. 1894, a body corporate, doing business within the District of Columbia, and as such was the owner of certain cars and steam-engines which it used in the transportation of passengers and freight upon a certain railroad track laid along Maryland avenue southwest, a public highway in said District of Columbia; that just about dark on the 10th day of December, 1894, the plaintiff was assisting his father,

Charles J. Cumberland, in the lighting of the lamps on said public highway, and was attempting to cross over said public highway at a place situated about 100 feet east from the east end of the Long bridge, which crosses the Potomac river at the west end of said Maryland avenue, and although said plaintiff was exercising due care and was without fault or negligence, yet he was struck by engine in the possession of and operated
2 by said defendant along and on said Maryland avenue, and was thereby violently thrown to the ground and so severely and permanently injured that his right arm was crushed and broken by the wheels of said engine passing over the said right arm of the plaintiff, and it thereby became necessary to amputate the said right arm between the elbow and shoulder; that the said engine which struck and injured said plaintiff belonged to and was operated by said defendant and its agents, and at the time of said injury to the said plaintiff said engine was being backed along and upon the track in the direction of the plaintiff at the place where said plaintiff was injured as aforesaid, and there was no light upon the rear part of said engine to indicate its approach, nor was there any signal of the coming of said engine given by said defendant or its agents, and there was no gate or fence erected alongside of said Maryland avenue at the place of said injury, so that the plaintiff was entirely unaware of any danger to him on account of crossing over said Maryland avenue or of the coming of said engine in said direction; that by reason of the reckless and grossly careless manner in which the agents of said defendant operated said engine in failing to place any light upon the rear part of said engine, which was being backed along said Maryland avenue in the direction of the plaintiff, so as to indicate the approach of said engine, and said defendant company and its agents failed to give notice in any manner whatever to the said plaintiff or to any one else of the coming of said engine along said Maryland avenue. The
3 plaintiff, although exercising due care, did not see said engine or know of its approach until he was violently struck and thrown to the ground and permanently injured, as aforesaid; that by reason of said injury so received on account of and by the grossly negligent acts of the defendant and its agents the plaintiff was dangerously and permanently injured and dismembered of his right arm between the shoulder and elbow, and suffered great anguish of body and mind.

Whereupon plaintiff brings suit and claims twenty thousand dollars damages, besides costs of suit.

W. PRESTON WILLIAMSON AND
LUTHER R. SMITH,
Attorneys for Defendant.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

W. PRESTON WILLIAMSON AND
LUTHER R. SMITH,
Attorneys for Plaintiff.

4 *Affidavit.*

Filed Mar. 12, 1895.

In the Supreme Court of the District of Columbia.

CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland, Plaintiff,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant.
} At Law. No. 37720.

Charles J. Cumberland, being duly sworn, says that Charles Emmet Cumberland, an infant, who sues by his next friend, Charles J. Cumberland, is the plaintiff in the above-entitled cause; that the said Charles Emmet Cumberland has no property of any kind in his own right, and that neither Charles Emmet Cumberland nor the affiant, because of his poverty, is able to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action; that said suit is brought against the Baltimore and Potomac Railroad Company, a body corporate, to recover damages for injuries done to the said Charles Emmet Cumberland, who sues by his next friend, by the grossly careless and wrongful acts of the defendant and its agents in backing an engine owned and operated by the defendant in the District of Columbia over the plaintiff and permanently injuring him, so that it became
5 necessary to amputate his right arm above the elbow-joint.

his
CHARLES J. x CUMBERLAND.
mark.

Witness:
A. W. MELOLING.
LUTHER R. SMITH.

Subscribed and sworn to before me this 12th day of March, 1895.
JOHN R. YOUNG, *Clerk.*

Plea.

Filed Apr. 3, 1895.

In the Supreme Court of the District of Columbia.

CHARLES EMMET CUMBERLAND, by His Next Friend, CHARLES J. CUMBERLAND,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY.
} At Law. No. 37720.

And now comes the defendant and for plea says that it is not guilty in manner and form as plaintiff in and by his declaration hath alleged.

ENOCH TOTTEN,
Attorney for Defendant.

6 *Joinder of Issue.*

Filed Apr. 19, 1895.

In the Supreme Court of the District of Columbia.

CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland, Plaintiff,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant.
} At Law. No. 37720.

The plaintiff joins issue upon the plea of the defendant, The Baltimore and Potomac Railroad Company.

W. PRESTON WILLIAMSON,
LUTHER R. SMITH,
Attorneys for Plaintiff.

Memorandum.

November 3, 1897.—Verdict for plaintiff for $8,000.00.

7 Supreme Court of the District of Columbia.

FRIDAY, *December* 24, 1897.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland, Plaintiff,
vs.
BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant.
} At Law. No. 37720.

This case coming on to be heard upon the defendant's motion for a new trial, and the same having been heard, it is considered that said motion be, and the same is hereby, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiff recover against the defendant eight thousand dollars ($8,000) damages, as aforesaid assessed, together with his costs of suit, to be taxed by the clerk, and have execution thereof.

Memorandum.

January 3, 1898.—October term of the court prolonged thirty days to settle bill of exceptions.

8 *Appeal.*

Filed Jan. 11, 1898.

In the Supreme Court of the District of Columbia.

CHARLES EMMET CUMBERLAND, by His Next Friend, CHARLES J. CUMBERLAND,
vs.
BALTIMORE & POTOMAC RAILROAD COMPANY. } At Law. No. 37720.

And now comes the defendant and appeals to the Court of Appeals of the District of Columbia from the judgment rendered herein on, to wit, December 24, 1897.

ENOCH TOTTEN,
Attorney for Defendant.

Citation waived.

A. S. WORTHINGTON &
W. PRESTON WILLIAMSON,
Attorneys for Plaintiff.

Memorandum.

January 11, 1898.—Appeal bond filed.

9 Supreme Court of the District of Columbia.

FEBRUARY 2, 1898.

CHARLES E. CUMBERLAND, by Next Friend, Plaintiff,
vs.
THE B. & P. R. R. Co., Defendant. } At Law. No. 37720.

Now again comes here the defendant, by its attorney, and tenders to the court here its bill of exceptions taken during the trial of this case, and prays that the same may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

Bill of Exceptions.

Filed Feb. 2, 1898.

In the Supreme Court of the District of Columbia.

CHARLES EMMERT CUMBERLAND, by His Next Friend, CHARLES J. CUMBERLAND,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } Law. No. 37720.

Be it remembered that the above-entitled cause came on for trial before Mr. Justice Cole and a jury on the first day of November,

1897, Mr. A. S. Worthington and Mr. W. Preston Williamson representing the plaintiff, and Mr. Enoch Totten and Mr. J. S. Flannery representing the defendant.

And thereupon the plaintiff, CHARLES EMMERT CUMBERLAND, to maintain the issues on his part joined, testified on his own behalf as follows:

Q. What is your full name, Charles?
A. Charles Emmert Cumberland.
Q. How old are you?
A. I am 15 years old.
Q. What is your birthday? Do you remember?
A. The 26th of August.
Q. You were 15 on the 26th of last August?
A. Yes, sir.
Q. Where do you live now?
A. I live on 13½ street.
Q. Southwest?
A. Yes, sir.
Q. Do you remember the number of your house?
A. 231½ 13½ street.
Q. Were you living there in 1894 when this accident happened?
A. No, sir.
Q. Where were you living then?
A. I was living next door.
Q. You seem to have only one arm, Charles. Is that so?
A. Yes, sir.
Q. Will you hold up your stump there, if you have any, and let the jury see how much you have got left?

(The witness did as requested.)

Q. I want you to tell the jury how you lost your arm.
A. I was lighting lamps, and when I got done lighting my lamps I looked up and down both ways, and one passenger train went out, and as that one went out I started to cross, and this other one came in and knocked me down and ran over me.
Q. You have not told us where this lamp was that you had just lighted.
A. Between 14 and 13½ streets, on Maryland avenue.
Q. And on which side of Maryland avenue?
A. On the south side.
Q. How many lamps did you have to light that evening?
A. I had to light about thirty.
Q. How many had you lighted when this accident happened?
A. I had lit about twenty.
Q. Do you remember about what time you began?
A. I began at 5.48.
Q. How long would it take you to go the round?
A. It would take me about a half an hour.
Q. You had gotten about ⅔ through, had you?
A. Yes, sir.

Q. Are you sure it was 5.48?
A. No, sir; 4.48.
Q. I thought you were mistaken. What kind of a night was that?
A. It was a rainy, hazy night—a drizzly night.
Q. Was it light or dark or between?
A. It was dark.
Q. Which way was this train, which you said was passing, going?
12 A. Going south.
Q. Going towards the bridge, then?
A. Yes, sir.
Q. What kind of a train was it; a freight or a passenger train?
A. It was a passenger train.
Q. Did you have to cross the track in going north?
A. Yes, sir.
Q. How many tracks?
A. I only had to cross one.
Q. Do you know what struck you or hurt you? Did you know at the time?
A. No, sir.
Q. You said that you looked. Where were you when you looked and which way did you look?
A. I looked both ways, up Maryland avenue and down.
Q. When you say down, you mean in what direction?
A. Down, towards the north.
Q. Did you look toward the bridge?
A. Yes, sir.
Q. Was there anything in your way at that time? Could you see across the bridge, or how far down that way could you see?
A. I could see about 100 or 125 feet.
Q. What was there which prevented you from seeing further?
A. There was a telegraph box—an operator's box.
Q. When you looked down that way did you see anything?
13 A. No, sir.
Q. How far were you from the track when you looked down that way?
A. I was about twenty-five feet.
Q. And then you started to walk across the track?
A. Yes, sir.
Q. And do you remember anything further?
A. No, sir.
Q. Do you remember going upon the track?
A. No, sir.
Q. When you did look down there did you see anything coming your way?
A. No, sir.
Q. Did you hear anything?
A. No, sir.
Q. Did you hear any whistle or bell?
A. No, sir.

Q. Or warning of any kind?
A. No, sir; I didn't hear anything.
Q. Had you crossed there before?
A. Yes, sir.

And thereupon counsel for the plaintiff offered to prove by said witness that the father of witness had cautioned him to be careful in crossing the railroad tracks while lighting lamps; but counsel for the defendant objected to said proffered evidence, and the court sustained the objection.

And thereupon said witness, on direct examination, further testified:

14 Q. What is the next thing you remember?
A. The next thing I remember I was in a hospital. That is all I can remember.
Q. In what position were you when you came to your senses?
A. I was all mashed up and lying in the bed.
Q. Was your arm off then?
A. Yes, sir.
Q. Where was this lamp which you had to light next, which you were going towards?
A. That was across the street from this one, right straight across.
Q. And had you been in the habit of going over this route in the same way?
A. Yes, sir.
Q. From the lamp which you had just lighted over to the one to which you were going?
A. Yes, sir.
Q. Can you tell us whether there was any fence then along the railroad track on either side between the two lamp posts?
A. No, sir; there wasn't no fence along either side.
Q. Has there a fence been put there since?
A. Yes, sir.

And thereupon plaintiff further testified, upon cross-examination, as follows:

Q. Are you still lighting lamps?
A. Yes, sir.
Q. And at the same place?
A. No, sir.
15 Q. How long had you been engaged in lighting lamps at that time? How many months or years?
A. About a year.
Q. You had been at it about a year?
A. Yes, sir.
Q. Did you light the lamps down in that locality every evening?
A. Yes, sir.
Q. What kind of a ladder was it which you had for the purpose of lighting lamps?
A. It is a small ladder.
Q. It was a small ladder?

A. Yes, sir.
Q. How did you carry it?
A. I carried it on my shoulder.
Q. You say you had lighted a lamp on the south side of the avenue?
A. Yes, sir.
Q. Between what two streets was it?
A. Between 13½ and 14th streets.
Q. Was there only one lamp on that side of the avenue to light?
A. It was the last one I had to light on that side.
Q. But there were others which you were in the habit of lighting?
A. Yes, sir.
Q. Had you lighted them that night?
A. Yes, sir.
16 Q. Was anybody with you?
A. No, sir.
Q. Did anybody usually go with you while you lighted lamps?
A. Well, no, sir.
Q. How far did you live from that place?
A. I lived three squares from there.
Q. At what number did you live then?
A. 229 13½ street.
Q. You say that you looked both ways?
A. Yes, sir.
Q. What did you look for?
A. To see if there was any train coming either way.
Q. Where were you standing when you did this looking?
A. I was about twenty-five feet away from the track.
Q. About twenty-five feet away from the track furthest south?
A. Yes, sir.
Q. Was that the track on which you were hit?
A. Yes, sir.
Q. You say you saw a passenger train going south toward the bridge?
A. Yes, sir.
Q. And you did not see this other train coming toward you?
A. No, sir.
Q. What kind of a train was it that struck you?
A. It was a work-train.
17 Q. A work-train?
A. Yes, sir.
Q. When you started to go towards this track on which *which* this train was proceeding how fast did you go? Did you run or walk?
A. I was walking.
Q. Did you look toward the west—that is, toward the bridge—while you were walking over that twenty-five feet?
A. I don't understand you.
Q. Did you look again while you were going towards the track?
A. Yes, sir; I was looking.
Q. You looked again?

A. Yes, sir.
Q. Did you look immediately before you stepped on the track?
A. Yes, sir; I did.
Q. And you did not see the engine or the train?
A. No, sir.
Q. Which way did you look?
A. I looked both ways.
Q. Did you look towards the bridge before you stepped on the track?
A. Yes sir; I looked towards the bridge.
Q. And there was no train there?
A. No, sir.
Q. And there was no train in front of you?
A. No, sir.
18 Q. Did you hear a bell ring?
A. No, sir; I didn't hear no bell ring.
Q. You did not hear the bell ring?
A. No, sir.
Q. Do you remember whether you usually heard the bells ring down there or not?
A. No, sir.
Q. You did not hear them ring, usually?
A. No, sir.
Q. Was there anybody about there at work or doing anything at the time you went on this track?
A. I didn't see no one.
Q. You did not see any one?
A. No, sir.
Q. Did you hear anybody call out to you to look out for that train?
A. No, sir.
Q. Nobody?
A. No, sir.
Q. Were you in a hurry to get over the tracks to light that other lamp?
A. Well, I wasn't in such a big hurry.
Q. You were not in a big hurry?
A. No, sir.
Q. Did you usually walk or run from one lamp to the other?
A. I usually walked.
Q. You used to walk?
A. Yes, sir.
Q. Where was that lamp which you wanted to light next?
A. On the other side of Maryland avenue.
19 Q. On the north side of Maryland avenue?
A. Yes, sir.
Q. It was on the north side—that is, on the side opposite to where you were?
A. Yes, sir.
Q. Was it on a corner or in the middle of the square?
A. In the middle of the square.

Q. Between what two streets?
A. Between 14th and 13½.
Q. Then it was right opposite to where you were?
A. Yes, sir.
Q. At what point did you undertake to cross over the tracks; on 13½ street or below 13½ street?
A. Below 13½.
Q. About how far?
A. About 100 feet.
Q. 100?
A. About 100.
Q. Was it about half way between 13½ and 14th streets?
A. Yes, sir; it was half way.
Q. You think it was about half way?
A. Yes, sir.
Q. Fully half way?
A. Yes, sir.
Q. How far is it from you to me?
A. Well, about thirty feet.
Q. Do you know how far it is from where you are sitting clear across this room, right past me?
20 A. It is about ninety feet.
Q. Was it an engine which struck you?
A. It was an engine; yes, sir.
Q. It was an engine?
A. Yes, sir.
Q. Did it knock you down?
A. Yes, sir.
Q. Have you any recollection as to how fast it was going?
A. No, sir.
Q. You do not remember that?
A. No, sir.
Q. Do you remember anything after you were struck?
A. No, sir; I don't remember nothing.
Q. You do not remember anything?
A. No, sir.
Q. How long had it been dark that night before you started to light your lamps?
A. It had been dark a little after five o'clock.
Q. A little after five?
A. Yes, sir.
Q. What time did you say this accident occurred?
A. About 4.38.
Q. You do not remember that?
A. Yes, sir.
Q. What time did you begin to light your lamps that night?
21 A. I began to light them at 4.48.
Q. You say you had about fifty lamps to light?
A. No, sir; I had about thirty to light.
Q. How long did it usually take you to light all of those lamps?
Q. It taken me about half an hour.

Q. Were there any lights about that locality at the time you were struck?

A. No, sir.

Q. No lights at all?

A. No, sir.

Q. I believe I asked you how many lamps you had lighted. You said about twenty, did you not?

A. About twenty.

Q. You had lighted about twenty, had you?

A. Yes, sir.

Q. How far was that lamp which you did light located from the place where you were struck?

A. That was about thirty feet.

Q. Did it throw any light on the tracks?

A. No, sir; it didn't throw no light on the track.

Q. It enabled you to see the tracks, did it not?

A. Yes, sir.

Q. You could see this track before you stepped on it, could you not?

A. Yes, sir.

Q. Were there other lights about there—any electric lights about the bridge?

22 A. No, sir.

Q. You said something about there being a telegraph-house or a box there. About where was that located; can you remember?

A. That was about 100 feet from where I was struck.

Q. Which way; towards the bridge or the other way?

A. The other way.

Q. Did you ever go to school?

A. Yes, sir.

Q. What school did you attend?

A. Bradley.

Q. The Bradley school?

A. Yes, sir.

Q. How long did you go to school there?

A. I went to school about four or five years.

Q. You can read and write, of course?

A. I can't read.

Q. Can you not read?

A. No, sir.

Q. Then you cannot write, either?

A. No, sir.

Q. Can you not read at all?

A. No, sir.

Q. Did you go to school before the accident for four or five years?

A. Yes, sir.

Q. Had you been to school any since?

A. No, sir.

23 Q. Do you remember how far the nearest switch is from the place where you were struck? There is a switch there?

A. That was about eighty feet.
Q. Eighty feet?
A. Yes, sir.
Q. That would be nearly the distance across this room, according to your idea?
A. Yes, sir.
Q. Was there not a big electric light over that switch, right in the neighborhood of it?
A. Yes, sir.
Q. On a pole?
A. Yes, sir.
Q. That electric light was going, was it not?
A. No, sir.
Q. Wasn't it?
A. No, sir.
Q. It was out, was it?
A. Yes, sir.
Q. Are you sure of that?
A. Yes, sir.
Q. Might you not be mistaken about that?
A. No, sir.
Q. Then the only light which was around there that you saw was the light which you had just made yourself, the lamp that you had just lighted, and that was about thirty feet away from you?
A. Yes, sir.
24 Q. Do you know which side of the engine struck you? Had you gotten part of the way across the track, or were you struck just as you stepped upon it?
A. I think I was struck just as I stepped on the track.
Q. You were struck just as you stepped on it?
A. Yes, sir.
Q. Do you know how you fell down, which way you fell?
A. No, sir.
Q. You do not remember?
A. No, sir.
Q. You did not see this engine at all, did you?
A. No, sir.
Q. Nor did you hear it?
A. No, sir.
Q. Usually an engine and a train together make a good deal of noise passing along that part of the tracks, do they not?
A. Yes, sir.
Q. You can hear them a good ways?
A. Yes, sir.
Q. How far did you say your father's house was from this place?
A. About three squares.
Q. And you had been lighting lamps there about a year before this accident happened?
A. Yes, sir.
Q. What were you doing prior to the time when you began to light lamps?

25 A. Sir?

Q. What were you doing before you began to light lamps?

A. I was doing nothing.

Q. You were doing nothing?

A. Yes, sir.

Q. Did you ever go down to that neighborhood to play?

A. No, sir.

Q. Around the head of the bridge?

A. No, sir.

Q. How many tracks were there down there?

A. I don't know exactly.

Q. You don't know exactly?

A. No, sir.

Q. For whom were you working when you were lighting lamps at that time?

A. I was lighting for my father.

Q. For your father?

A. Yes, sir.

Q. It was his business to light the lamps?

A. Yes, sir.

Q. Where was he at this time?

A. He was lighting them, too.

Q. Do you know where?

A. He was lighting them in the northwest.

Q. In the northwest?

A. Yes, sir.

Q. Do you mean that he was lighting further towards the city than you were?

26 A. Yes, sir.

Q. He did not light the lamps all over the city, did he?

A. No, sir.

And thereupon the plaintiff testified upon redirect examination as follows:

Q. You say you were struck by a work-train. How do you know that?

A. That is what my father told me after I came out of the hospital.

Q. You do not know anything about what struck you, then, but what you have been told?

A. Yes, sir.

Q. What makes you think you were struck just as you were stepping on the track?

A. Because I knew that I was carried away, and I found myself at the hospital.

Q. I see. But my question is, How do you know that you were not struck after you got nearly across the track, for instance; or do you know anything about it?

A. No, sir; I don't know nothing about it.

Q. When you first looked for the train—looked down towards the bridge—how much of the way between this lamp that you had

just lighted and the track had you passed over? Had you gone $\frac{1}{16}$ of the way or $\frac{1}{3}$ of the way or half of the way or how much?

A. I had gotten about half of the way.

Q. You had gotten about half way?

A. Yes, sir.

27 And thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness CHARLES J. CUMBERLAND, who testified that he lived at 239½ 13½ street, not 229, as the plaintiff had testified; that he was living next door, at 228, he thinks—next to 239½—at the time of the accident in question; that the witness at the time, as a lamplighter, had a right large route, and was under the weather himself, nearly blind; that he could not see, and had the plaintiff to help him out.

(The witness was proceeding to state further why he put the boy on the route by the railroad, when defendant's counsel interposed an objection; whereupon the plaintiff's counsel directed the witness not to state why he put his son down there, since defendant's counsel objected to it.)

The witness, resuming, said that on the evening of the accident he got home about half past five; that it was dark, rainy, foggy, and very cold; that about ten minutes after he got to his house he heard of the accident and went out to see his boy, and found him at the Emergency hospital between seven and eight o'clock; that when he did find the plaintiff the latter's arm had already been amputated; that he had last seen his son, the plaintiff, at 4.52 that afternoon, when they at the same time started out on their respective routes; that the plaintiff was then all right—in splendid condition; that there is just as much difference between the plaintiff now and the way he was before the accident as there is between day and night; that he was a splendid boy, and went with the plaintiff all the time, and now he never goes around with him
28 at all; that there is some other company he goes around with; that he is a different boy altogether; that he has a kind of giddiness in his head half the time; that you can tell him anything today and ask him about it tomorrow and he will forget all about it; that he was bright enough before the accident, but that since he got hurt he can't recollect hardly anything; that the witness is familiar with the locality where the accident occurred; that a person standing at the place where the plaintiff was hurt can't see across the bridge, but might see down to the switch, a distance of about 184 feet, and the draw-house was about 4 feet from the switch, on the south side of the track.

On cross-examination the witness further testified that the plaintiff was an active and bright boy at the time of the accident; that the plaintiff was born August 26, 1882; that this draw-house stood right on the end of the bridge; that it was eight feet high, and that a boy standing 150 feet from the end of the Long bridge could not see a train coming from the Long bridge, because of the obstruction caused by this house; that the plaintiff still assists witness in light-

ing lamps; that now he lights them only on the north side of Maryland avenue; that their route has been changed; that at the time of the accident witness was not engaged in any other business; that he was nearly blind and could not see and had to have the boy to help him out; that that was the reason he had the boy.

On his redirect examination the witness was asked the following question: "I wish you would tell us why it was that the boy
29 at the time of this accident was on this route where he was while you were on the north of Maryland avenue."

The witness said: "He was there, as I was telling you. I had been at the hospital blind, and I had the boy down there because it was a dangerous"——

At this point defendant's counsel again interposed, objecting to the testimony on the ground that it was immaterial and improper; whereupon plaintiff's counsel remarked that because of the objection he withdrew the question.

And thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness ALBERT P. MOTLEY, who testified that he was a brakeman for the Southern Railway Company; did not know the plaintiff before he was hurt, but had seen him lighting lamps just before the accident; that he (witness) was standing at the Southern Railroad Company's crossing east of the crossing at 13½ street, watching the trains going to and from the race-track, a lot of which were passing back and forth; that he saw the boy light a lamp between 13½ and 14 street-, and then take his ladder and go towards the railroad track; that at that time witness saw no train coming towards him; that he took no further notice of him until his attention was attracted by a noise, and he looked up and saw a crowd of men about an engine attached to a work-train. On approaching he saw that they were taking the plaintiff from under the pilot of the engine, which, with the tender, had passed over him as it was running backwards; that the engine had got very near to the crossing at 13½ street, half a square from the gate, as near as he could estimate it; that he saw no headlight on
30 the engine, nor did he see any lamp or light; that he did not hear any blowing of the whistle or ringing of the bell of the engine; that he was not looking towards the bridge and was not paying any attention to any train coming up that way; that he was merely looking at the race-track trains on the main track; that he saw a passenger train bound south pass, and this latter train was about opposite the boy when he saw him going towards the track, and that it was a dark, rainy, misty evening.

And thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness JOHN JOSIAH FAUNCE, who testified that he was a laborer and had known the plaintiff all his life; that he lived within two squares of him, saw him frequently, and did not consider him as bright as most boys of twelve; that he acted like a child 7 or 8 years old; that just before the accident occurred he (witness) was standing at the north end of the Long Bridge, about

300 feet from 13½ street, when the aforesaid work-train passed him, about fifteen feet away; that the locomotive was at the front end of the train, pulling it, but that it was running backwards, tender first; that there was not a regular headlight on the rear of the tender, which was then the forward end of the engine, but that there was a small white hand lamp hanging thereon, such as brakemen carry for signalling, and this was lighted and shining, but it was not a very bright light; that there was no fireman on the forward part of the engine; that he neither heard the whistle blow nor the bell ring; that this train was moving at the rate of from 12 to 15 miles per hour; that it was about twenty minutes after five
31 o'clock; that it was drizzly, misty weather, and it was getting dark.

And thereupon said witness on cross-examination further testified that he had never seen any other kind of a light on the rear of the tender of a backing engine than this one, nor one that gave a brighter light; that he did not know whether or not there was anybody on the engine; that he did not see either the engineman or fireman; that there was an electric light on a big pole at the north end of the bridge; that he had no difficulty in seeing what was going on there; that he did not see a passenger train going south, and that if one had been going south he would have noticed it; that the train may have gotten past there; that he does not usually notice the ringing of a bell; that he first saw the light on this tender when the engine was coming across the bridge, about 200 feet away; that he could have seen as far as 13½ street from where he stood, about 300 feet away; that he never timed a train, but this train was going much faster than the cable cars ran then.

On redirect examination said witness further testified that he has noticed that the shifting engines used about the yards of the company have headlights on the rear end; that the electric light was lighted and was a pretty bright light; that it was about 80 feet from the ground and had a hood over it.

On recross-examination said witness further testified that the lights on the rear of engines backing over the Long bridge are generally small, except on shifting engines; that this was like
32 the other hand lamps, only it gave a dim light; that witness thought it was not turned very high, from the light it gave.

And thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness WILLIAM P. CORCORAN, who testified that he is 38 years of age; that his business is that of assistant bookkeeper; that he has *the* known the plaintiff all his life, having been in his company a great deal before the accident in question; that the witness and the plaintiff and the plaintiff's father had been out fishing a great deal, and that he in that way was thrown in the plaintiff's company; that witness was not fishing for fun, but fishing for a living, and that the plaintiff's father was also fishing for a living, and the witness was going along with him helping him out; that at times the boy would be along on these occasions; that off and on he had seen the plaintiff a good deal in other ways, be-

cause the plaintiff lived right close to the witness; that before the accident the witness lived about two doors away from where the plaintiff lived; that before that the witness lived about 6 or 7 squares away from him; that just prior to the accident the plaintiff was willing to do what he was able to do in the way of work, but witness did not think he was as bright a boy as a boy should be at his age; that at that time witness would not take him to be any smarter than a boy about 6 or 7 years old, but that witness would judge that the plaintiff was then about 10, 11, or 12 years old.

And thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness Mrs. FRANCES CAMPBELL,
33 who testified that she was a school teacher; that the plaintiff had been a pupil of hers for about three months immediately before this accident in question; that at the time he was not quite as bright as most boys of his age; that he would not compare favorably in intelligence with the average boy; that he was about as smart as a boy of eight years of age; that there are other boys of eight that were much brighter than the plaintiff, and that he was as bright as some boys of eight.

And thereupon the plaintiff, to further maintain the issues on his part joined, offered in evidence the police regulations in force at the time of the said accident, which were propounded by the Commissioners of the District of Columbia in pursuance of the act of Congress approved January 26, 1897, and a joint resolution of February 26, 1892, especially section 16, the original reading of which is in the words and figures following, to wit:

"Whenever the grade of a steam railroad track is approximately even with the adjacent surface, the line of the road shall be securely closed on both sides with a substantial fence, and all grade crossings or intersection of any steam railroad tracks with streets or avenues shall be securely guarded by a suitable gate or guard, erected and maintained by the company owning or operating such track."

Then that section was amended July 26, 1894, so as to read as follows:

"Between sunset and sunrise of each day, a headlight, or other equivalent reflecting lantern to give due warning to persons
34 near or crossing steam railroad tracks of the approach of trains, locomotives or cars, shall be displayed upon the advancing end of every train of steam railroad cars, and of single steam railroad cars and locomotives not in trains, when moving in the District of Columbia. It shall be unlawful for any person to set in motion, or run or operate any train of railroad cars, single railroad cars or locomotives without the said display of such lights or lanterns."

And thereupon counsel for the plaintiff read in evidence to the jury the following section of the police regulations of the District of Columbia:

"SEC. 15. Steam cars, trains or engines shall not move upon any

street or avenue at a greater rate of speed than twelve miles an hour, and no steam car, train or engine shall be stopped or held at a street crossing or intersection so as to obstruct the passage of vehicles or foot passengers for a longer period than is needed for the passage of such steam car, train or engine at a speed of not less than five miles an hour."

And thereupon counsel for the plaintiff announced their testimony closed.

And thereupon the defendant, to maintain the issues upon its part joined, produced as a witness one GEORGE H. BROWN, who testified that he is a civil engineer by profession, and is a supervisor on the railroad of the defendant company. Witness produced a map which he said was a map of the locality where the accident in question occurred. Witness testified that the map was made
35 under his instructions, and that it was substantially a correct map.

Thereupon the map was offered in evidence by defendant's counsel. A copy of the same is hereto appended and made a part of this bill of exceptions and marked Exhibit A.

The witness, resuming his direct examination, but in response to questions propounded by plaintiff's counsel, stated that the place marked "point of accident" on the map was located by him from statements made by witnesses "whom we got hold of;" that it was made about two months before the trial; that the map did not have the fence on it. Thereupon plaintiff's counsel asked the witness to state where the fence is, and he replied, "It is just directly outside of the curb line that runs along there" (indicating on the map); and thereupon the defendant's counsel asked where the fence was on the "south side of the track," and the witness answered that it extended from 13½ street to within 7 or 8 feet of the crossing forming the entrance to the Southern railroad's "yard."

On cross-examination the witness further testified that the dotted line on the map running along north of the railroad tracks represents the curb line, which incloses the railroad company's right of way; that when the fence was put up it was put up directly outside of that curb line; that it runs down from 13½ St. to a little beyond the curb line on 14th St.; that there is an opening there, and then the fence continues on down along the railroad; that that fence was not there four years before the trial.

On his redirect examination the witness testified that from
36 13½ St. to the main-line switch is 307 feet and 6 inches; that from there down to the end of the Long bridge is about 300 feet more; that from the switch-box on the map to 13½ St. is in the neighborhood of 289 feet; that the place marked on the map "point of accident" is about 480 feet from the end of the Long bridge and 160 or 165 feet from the switch-box; that from the lamp which the defendant had lighted just before the accident to the point of the accident is about 40 feet; that the "point of accident" has been located by blood on the ties; that the distance from the

track on which the plaintiff was injured to the next track north was about 9 feet, and that the distance between the rails is 4 feet 9 inches.

The witness, being recalled and further examined on behalf of the defendant, testified that the curb is about 4 or five feet away from the rails on each side of the main track; that the distance between the two curbs between 13½ and 14th Sts. is 53 feet and the curb is about eight inches above the surface of the roadway; that at 13½ St. the tracks and curb are both flush with the street, but that half way down the square towards 14th St. the tracks are a foot and a half above the curb, making them 2 feet 2 inches above the roadway; that there is no fence on the south side of the track between 13½ and 14th Sts. at the point where the boy started to cross, and that there was no fence at that point at the time of the accident; that it would be impossible to put a fence across there on the south side on account of the location of the siding.

On the cross-examination of the witness by plaintiff's
37 counsel the following occurred:

Q. There was at that time nothing to prevent a fence being built along the north side of this track from 13½ to 14th street, was there?

A. I can't tell you. I was not here then.

Q. Is there anything put there now?

A. The fence is there now.

Q. Do you know how long after the accident this fence was put there?

A. This fence has been there a little over a year.

Q. How high a fence is that?

A. About four feet and a half.

Q. It is what you call a paling fence, is it not?

A. Yes, sir.

Q. Is it to prevent people from crossing the tracks at this point?

A. It was put there with that object.

Mr. TOTTEN: I object to that. It is not a proper question.

Mr. WORTHINGTON: I insist that it is. This regulation requires the tracks to be fenced in on both sides and to have gates at the intersections of streets, the manifest object of it being to prevent the crossing of the tracks between streets, and the streets to have watchmen and gates, so as to prevent the recurrence of just such accidents as this. As an excuse—I have allowed it to go in for what it is worth—for not having a fence at this point, Colonel Totten has asked this witness to testify that they could not
38 have a fence here on this side (indicating). Now, I ask him if there was anything to prevent the fence required on that side, and it turns out that the fence has been put up within a year, and there was nothing to prevent it.

The COURT: Does he say there is no fence on that side?

Mr. WORTHINGTON: There is none there now.

The COURT: I think that is all competent.

Mr. TOTTEN: I ask your honor to strike out the answer of the witness to that last question.

The COURT: I overrule the motion.

And thereupon counsel for the defendant then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

On further cross-examination the witness said that so far as he could judge there was nothing to prevent a fence from being built on the south side of the tracks between 13½ and 14th Sts., leaving an opening in the fence for the switch; that the distance from rail to rail at the point where the accident occurred is 9 feet, and they are obliged to have a clearance of 10 feet or a clear space of 5 feet from each rail.

And thereupon the defendant, to further maintain the issues on its part joined, called as a witness CHARLES R. BUSH, who testified that he was a locomotive engineer, and that he was running the engine that struck the plaintiff, though he did not see it strike him; that he had a train of six flat cars and a caboose, and was coming from the Long bridge; that the engine was pulling the train, but was moving backwards
39 with the tender first, upon the forward end of which tender was hung a hand lamp; that this lamp gave a pretty bright light; that there was no difficulty in seeing what was going on there; that his train was moving at a rate of about eight or ten miles an hour; that the accident happened about sixty feet west of 13½ street; that it was getting dark and when he was between 14t street and the place where the accident happened he saw the for of a person moving at a brisk walk in the direction of the track, about fifty or sixty feet away; that he could not tell whether it was a man or boy; that at that time "he was watching where he was going," and the fireman was doing the same and ringing the bell; that the fireman began ringing the bell after leaving the causeway of the Long bridge; that witness was in the neighborhood of thirty feet from the boy when he saw he was coming so near the track that witness thought probably he was going to walk on it; that he then reversed the engine and applied the brake to stop; that as the person was in the act of stepping up on the ties the tender in front of witness hid him from view; that he was still walking at a brisk gait, and a couple of steps more would have put him right in the middle of the track; that he did not actually see the collision between the tender and the boy; that he stopped his train, and the first thing he did was to ask the fireman if he had struck him, and he said, "I believe we did;" that they then got down and looked for him and found him right at the point of the pilot; the engine and tender had run over him and he was lying under the truck of the first car, next to the engine, right at the point of the
40 pilot; that he was lying kind of diagonally, with his head towards the north rail; that he looked as though he had

fallen towards the north rail; that when they saw him approaching the track and after witness had concluded that he might go upon the track he rang the bell, and both witness and the fireman "hollered" to him as hard as they could; that he could not tell in which direction the boy was looking because it was getting dusk; that it was a dark, cloudy evening; that at the time the boy was struck the rear end of an Alexandria accommodation train, going south, had just passed witness's engine; that witness had been running an engine two years and a little over three months at the time the accident happened; that after he undertook to stop the train it took him a couple of seconds, hardly, to stop; that the two first tracks from the north are the north and south bound passenger tracks, and the third track is a freight track, upon which the witness's train was running.

And thereupon, on cross-examination, said witness further testified that when they stopped the front end of the engine, as they were running, was right flush with the west curb of 13½ street, right where the gate begins; that the distance in which a train can be stopped going at the rate of eight miles an hour depends very much on the condition of the track; that witness had never tried to stop a train going at that rate of speed to see in what distance it could be stopped; that if a child were on the track in front of him and he were called upon to stop the train suddenly, when it was moving at
41 a rate of eight miles an hour, he supposes it could be brought to a stop in about ninety to a hundred feet after the brakes were put on and the engine reversed; that he could not say exactly in what distance a train going at the rate of forty miles an hour could be stopped, but supposes that it would take probably a couple of hundred yards; that on this night, after he put on his brakes and reversed his engine, it came to a stop within between eighty and ninety feet; that when his train came to a stop he called to the gateman, who was standing at his gates at 13½ street, and asked him if they had struck that person; that they were not sure at that time that they had struck the person or whatever it was; that the gateman said, "I think you did," or "You did;" that the witness was on the north side of the cab and the fireman was on the south side; that he supposes that there was nothing to prevent the fireman from looking out on the south side of the engine and seeing the boy get on the track; that witness did not know whether it was a boy or girl, or man or woman; that he knew it was a person of some kind; that the light they had in front did not throw an illumination on the object so that he could tell whether it was a man or child; that when he first saw the boy he was about fifteen feet from the track, and witness himself was about sixty feet away from him in a straight line when he first saw him; that at that time witness did not put on his brakes and reverse his engine; that he waited until he saw he was approaching near the track and thought he would stop; that he thought he would stop before he got on the track; that there was not light enough to see whether this boy had
42 anything in his hand; that when the track is wet they can stop much quicker by the use of sand; that when they are running backwards they cannot run sand under the drivers

of the engine, but they can under the train; that the lever by which sand is applied to the track is right by where he stands; that he does not remember whether he used sand on this occasion or not.

And thereupon the defendant, to further maintain the issues upon *his* part joined, called as a witness CHARLES H. MADDOX, who testified that he was the fireman of this train; that he was on the south side of the engine, looking out of his window towards the east and ringing the bell; that he began ringing the bell after leaving the causeway and when they were about crossing the channel, before reaching the south end of 14th street; that it was about five minutes after five o'clock, but it was not clear dark; that when he first saw the boy he was approaching the track in a brisk walk, and was about fifteen or twenty feet from the track, making his way north; that he appeared to be looking across towards the train moving on the south bound main track; that he saw he was carrying some object, but could not make out what it was; that he saw him put his foot on the end of the ties, and called the engineer's attention by "hollering;" that about the time witness "hollered" the boy was at the end of the tank on the tender; that he could see him step on the track by looking out through his window; that when he first saw him he leaned out of the window, because he expected to see him go on the track; that when witness concluded that he was going to get on
the track he was just putting his foot on the end of the
43 ties when witness "hollered" to the engineer; that the
engineer applied his brakes and reversed the engine and also "hollered;" that when he last saw him the boy was looking directly north, straight across the track; that he did not seem to take any notice of witness' train at all; it seemed as if his attention was called to the train going south, the passenger train; that when he stepped on the track he was walking along at a good gait; that there was a hand lamp on the front end of the train; that witness put it there himself; that it gave a pretty good light; that witness noticed after the accident that it was burning good; that when the train stopped he went right over to the back end of the tender and saw the lamp; that he did not get down at that time, but looked to see if he could see anything; that he thought that maybe they had struck the person and hadn't gone over him; that he then came back and got down with the engineer; that at the time they struck the boy they were going between eight and ten miles an hour.

And thereupon said witness, on cross-examination, further testified that there was no occasion to get up speed at this point because they had a light train; that he had never been on a train except on this occasion when the engineer stopped it as quickly as he could that after the engineer reversed the engine and put on his brakes it moved about the length of an engine, which is between fifty-five and sixty feet; that the boy was found between the trucks of the first car the pilot of the engine went under the car; the engine and tender
had gone entirely over him; that witness is pretty sure that
44 the boy was not dragged; that he could not say where the
front end of the tender was when they stopped; that it was

just dusk and witness could not tell whether it was a boy or girl or man or woman; that the lamp on the tender would not shine in the direction from which the person was approaching the track; that it did not give a light in every direction; that it was swinging on a hook; that it would give a light straight in front and would not to the side; that when he saw the boy step up on the ties he called to the engineer to look out, there was some one on the track; that he does not know that that was the first notice the engineer had of the boy; that witness and the engineer had said nothing to each other about the boy before witness saw the boy put his foot on the ties and called the engineer's attention to it; that witness lighted this hand lamp and hung it on the tender when the train started on the other side of the Long bridge; that after the accident the first thing he did was to see whether the lamp was still there; that he did not go particularly to see if the lamp was there, because he knew it was there, but also went to see if the boy, or whatever it was that had been struck, had been knocked down; that the headlight of the engine was lighted; that this headlight was pretty bright and was throwing its light towards the rear on the first car.

And thereupon the defendant, to further maintain the issues upon its part joined, called as a witness ROBERT DEAVERS, who testified that he was the conductor of the train, but was in the caboose, the last car in the rear of the train, and did not see the accident.

45 Said witness, on cross-examination, further testified that there was a hand brake on the caboose which was operated by the flagman; that when the hand brakes are used they are operated in response to a whistle from the engine; that there was no air brake on the caboose; that on this occasion he thinks there was no whistle to use the hand brake and he did not see the flagman putting on the brake; that in the case of an emergency like this they can't apply the hand brake; they do not have time; that when he noticed the jar made by applying the air brakes his caboose was just coming off of the bridge at 14th street; that he did not notice where it was when the train stopped; that it appeared to him to have gone about sixty feet from the time he heard the jar made by the air brakes until the train actually stopped.

And thereupon the defendant, to further maintain the issues upon its part joined, called as a witness EDWARD F. ROBY, who testified that he was a switchman at 14th street and Maryland avenue at the time of the accident; that he was standing in front of the switch-house, which is about ten feet from the switch and about seventy feet from where the boy was struck; that he had known the boy through life and had known his father; that the boy had been engaged in lighting lamps down in that locality for about a year and was in the habit of crossing the tracks at that point; that when he first saw the boy the engine and one car had passed witness and the boy was then about ten feet from the track, going towards it; that he called to him just as soon as he saw him

going towards the track; that the boy did not turn his head
46 or indicated that he heard witness call; that he kept looking straight across the track; that the Alexandria local was just going out; that witness cannot say whether the boy looked at the incoming train, but he thinks his eyes were on the outgoing train; that witness called to him half a dozen times; that there were some vehicles on the street coming from Jackson City, the race track; the bell was being rung by the fireman; that Mr. Thomas, a friend of his, who was standing there with him, also "hollered" at the boy; that he called to him pretty loud; that Thomas "hollered" as loud as did witness, and both, witness thinks, "hollered" loud enough for the boy to hear; that there was a hand lamp swinging on the advancing end of the tender; the headlight was lit and was turned towards the train; that the train was running about eight miles an hour; that he could not tell what the engineer did about stopping the train; that the boy put his foot over the track nearest to him when the tender of the engine was right on top of him; he supposes it was about a foot from him; that he did not see the engine strike the boy, because he passed out of his sight; that he was walking pretty fast, and witness thinks he had the ladder across his right shoulder; that witness thinks about an engine and one car and a half of another one had passed him when they went over the boy; that the electric light near the switch-box was burning, and this light throws a pretty bright light; that you can read a newspaper by it anywhere around there; that at the time of the accident there was no fence between 13½ and 14th street on either side of the track; that there is a fence now on the north side of the
47 track, but not on the south side, at the point where the accident happened.

And thereupon said witness, on cross-examination, further testified that when the engine passed him he noticed that the fireman was ringing his bell; that he did not see the engineer who was on the opposite side; that the cab window was open and the fireman had his head on the side, looking out straight up the track; that the switch-box, where witness was, is on the south side of the track, and that he saw the boy as the engine passed witness; that he perceived distinctly that the boy was carrying a ladder; that he could see that it was not a man or woman or a girl; that he knew the little fellow without recognizing him, because he had come by there several times; that he had an overcoat on which came down somewhere about his knees; that he was not a very big boy; that at the time he first saw the boy the rear end of the Alexandria local had just passed as the work-train was coming in; that the Alexandria local had just passed and had got off on the bridge at the time the boy was struck; that he did not see the direction in which the boy's eyes were turned when he was walking towards the track just before he was struck; that if he had moved his head slightly he (witness) thinks he would not have noticed it; that there were hacks and carriages, maybe five or six, returning from the races, going up the street; that these carriages were making a noise; that the street

down there was paved with cobblestones; that these vehicles were on the north side of the street; that they were not on the
48 side where the witness was; that his switch-box is about two hundred feet in a straight line east of the electric light pole, which pole is about eighty feet high; that he can sit at his switch-box and read a newspaper by that light.

And thereupon said witness, on redirect examination, further testified that there was no obstacle between his box and the place where the boy was to obstruct the latter's view of the approaching train; that this hand lamp which was on the back of the tender gave a pretty bright light; that if the boy had turned his head towards the witness when the latter called to him he (witness) could have seen it; that there was light enough to see that.

And thereupon, on recross-examination, said witness further testified that the light on the tender was a- bright as the light in the lamp that he had in his hand, and his lamp was a pretty bright lamp; that he noticed it particularly because he wanted to see if the light was burning as bright as the lamp ought to be burning, and that the light on the tender was like the one he held in his hand.

And thereupon the defendant called as a witness JOHN R. THOMAS, who testified that he was a gate-tender for the Baltimore & Potomac Railroad Company, but at the time of the accident had no occupation; that he had known the plaintiff for a while before the accident; that at the time of the accident he was standing within ten feet of Mr. Roby, to the east of him; that he did not notice the boy until he got almost to the tracks, and Mr. Roby hollered at the same time the witness did; that when he first saw him the boy was about five feet from the track, going at a right good gait; that he
49 had a ladder with him and was carrying it on his right shoulder; that he had a little overcoat on that came down to his knees; that his head was turned towards the north, right directly opposite where he had lit the lamp; that witness hollered to him, "Hello there; look out," just as loud as he could; that he thinks that he called loud enough for the boy to hear under the circumstances; that he saw the train when it came in; that it was running at the rate of eight miles an hour—between eight and ten miles; that he was about sixty-five or seventy feet from the place where the boy was struck; that he noticed that the bells of both trains were ringing—that is, of the work-train and the Alexandria local; at the time he called to the boy the Alexandria local had just passed; that he saw the boy step over the south rail and then he lost sight of him; that he called to him seven or eight times; that he ran towards him, but did not get half the distance to him before he was struck; that Roby called to him as many times as did witness; that Roby had a hand lamp in his hand; that after the accident witness went around and found the boy under the trucks of the first car, about three feet from the cow-catcher; that witness took out the ladder and somebody else took out the boy; that when he called to the boy he thought, from the direction he was looking,

that he was watching the local train; that the boy did not look at the approaching train that struck him; that if he had looked at it there was no obstacle to prevent him seeing it; that at the time he stepped on the track he was about five feet from that portion of the engine that struck him; that at the time it was right
50 dark.

And thereupon said witness, on cross-examination, further testified that he had been in the employ of the defendant company about four months; that at the time he first saw the boy he was about five feet from the track, and does not know what he had been doing in the way of looking before that time; that when he first saw the boy the engineer and fireman were nearer him than the witness was; that there was no difficulty in seeing from where he was that the boy had a ladder; that at the time witness first saw the boy the engine had passed him; that the boy was between the railroad track and the gas lamp, and the reflection of the gas lamp enabled witness to see who the boy was; that the reflection of this gas lamp did not show on the boy's face, and if the engineer and fireman of the train had been looking at the boy they could have seen which way his face was turned as well as witness; that he heard the bells of the two trains ringing and dangling at the same time; that if anybody else besides himself and Mr. Roby shouted to the boy he did not hear him; that he did not recollect, but would not deny, telling counsel for the plaintiff at his office, in the presence of Mr. Cumberland, that the boy at the time he was struck was standing on the track, waiting for the local train to pass, when the other train came up and struck him; that if he did say it, it is not true, but that he did say on that occasion that he was satisfied that the boy could not hear him because of the noise made by the other train and the vehicles.

And thereupon, on redirect examination, said witness fur-
51 ther testified that they shouted loud enough for the boy to hear, but there was so much noise there made by the vehicles that witness does not think he heard them or he would never have gone on the track; that when he ran towards him calling to him it made no impression upon the boy; that at that time some of the vehicles were going pretty fast, rattling over the stones and making a noise that way.

And thereupon the defendant, to further maintain the issues upon its part joined, called as a witness JOHN T. PHILLIPS, who testified that at the time of the accident, in December, 1894, he was a gate-tender of the defendant company at 13½ street and Maryland avenue and had been since 1881, at different gates; that he had known the little boy who met with the accident pretty much all through his life; that he had talked to him time and time again before the accident; that he always seemed to be a pretty bright boy; that he was supple, sprightly, and got around lively; that he had seen him lighting lamps in that vicinity for about a year or so; that he was down there pretty much every night; that at the time of the accident the gates were down at 13½ Street crossing, on each side, shut-

ting the crossing off entirely; that the electric light gave a brilliant light and that he could see to read by it at his crossing; that he saw the boy just as he stepped on the track, but thought it was a girl; that it was done so quickly that he could not tell exactly whether it was a boy or a girl; that at the time he stepped on the track the engine was not over two feet from him; that the tender of
the engine had a light on it like those used for signals;
52 that it gave a tolerably fair light; that witness was standing on the north side of Maryland avenue at its intersection with 13½ street; that these two trains, the work-train and the Alexandria local, passed each other at the switch-box, right at the north end of the bridge; that he saw the light on the work-train engine half a mile; that the bell was ringing and had been ringing all the time from the time it struck the trestle-work at the north end of the bridge; that he heard calls from the direction of the switch-box, and looked around in time to see the boy step on the end of the track; that he did not hear anybody call to the boy from the engine; that the voices he heard sounded like two people were calling to him from the switch-box; that he saw two people standing down there, and that Roby, the switchman, had a light; that at the time the boy was struck his head was turned towards the north side of the street; that there was no obstacle between the boy and the approaching train that struck him; that the lights around there were sufficient to enable the boy to see everything; that he could have seen witness if he had looked at him, witness supposes; that he thinks the point where the boy was struck was about ninety feet from where he (witness) was standing; that he thinks the boy was about 200 *hundred* feet from 14th street.

And thereupon, on cross-examination, said witness further testified that at the time the engine of the construction or work train was at the switch-box the hind end of the other train was there,
and just as the work-train came to a stop the engineer asked
53 witness if he had hit anything and witness told him that he had; that the engineer did not get down off of the engine to come over to where he was, but he "hollered" to him; that he does not remember telling Mr. Cumberland a day or two after the accident that the engineer got off of his engine and came up to where he was and asked him if he had struck anything; that the engineer asked him if he had hit anything and witness told him he had; that he then got down off of *his* engine and looked around; that at that time he had stopped his engine right even with the crossing; that he did not measure the distance from his gate to where the boy was struck, he only guessed at it; that the point where the boy was struck was a little further east than the lamp that he had been lighting; that a line drawn from the lamp post on the south side of the avenue to the one on the north side would strike the track just about the point where the boy was struck; that he thought the boy was a girl because he had on a long coat; that he did not see the ladder; that when he saw the boy was going to get hit it somewhat confused him, so that he could not tell whether he saw a ladder or whether it was a boy or girl;

that he saw him when he stepped on the tracks, but, of course, he could not tell whether he looked towards the engine or not.

And thereupon, on redirect examination, said witness further testified that he shuts the gate when he sees a train a certain distance off; that on this occasion he put his gates down for the local train going south and before that had passed he saw the work-train coming and shut his gates down; that the work-train, when he
54 first saw it, was nearly half way of the bridge, which is about a mile long; that he at that time saw the light on the tender; that he could also see the reflection thrown on the cars by the headlight of the engine.

And thereupon, after counsel for the defendant had announced their testimony closed, counsel for the plaintiff showed by the foregoing witness that there was a telegraph tower near the scene of the accident (the position of which tower is indicated on the map herewith), and that the operator who was in said tower on the day of the accident was present in court.

And thereupon the defendant, to further maintain the issues upon its part, called as a witness B. J. BEAL, who testified that on the day of the accident he was the telegraph operator in the telegraph office or tower just referred to by the preceding witness and indicated on the map in evidence; that it was his duty to report trains and to give them the signals; that he did not see the accident, but heard the air brake applied on the work-train about the time he supposes it happened; that the work-train, when he first saw it, was coming out of the mouth of the bridge about half a mile away; that he supposes that it was going about six miles an hour; that the engine was coming backwards, with the tender in front; that there was a white light on the rear of the tank, and the other lights consisted of two white signals in front, headlight on the engine, and the red and green caboose lights which were at the rear of the train; that the electric light was burning at the time and there were several switch-lights which
55 are used to tell if the switch is set properly; that the switch-lights had a magnifying lens and gave a very bright light that could be seen a very long distance; that they do not make as much light around where they are located as they do straight ahead; that the electric light was on the south side of the railroad track, near the watchman's shanty at the bridge; that he heard the bell of this work-train ringing as it approached; that he noticed Mr. Roby; that it was his business to see that Roby was always out at the switch; that the locality around there was well lighted, and there was sufficient light for a person to go around there and find the switch level without a lamp; that the electric light cast a very brilliant light around there; that at the time when he heard the air brakes put down on the work-train he supposes the rear end of the local train for Alexandria had just passed him.

And thereupon said witness, on cross-examination, further testified that there were four lights in all that he had to look for, and if either of the four lights was not lit it would be his business to report

it; that when he went out after the accident he noticed most particularly that they had all the necessary lights; that the two white lights that he mentioned were on the boiler-head of the locomotive, on each side of the headlight; that they were not illuminating the track in front of the locomotive to any great extent; that the tower where the witness was standing was eight or nine feet from the extreme top to the ground, and witness' seat was directly on a
56 level with the top of the rail; that he thinks that at the time he heard the air brakes applied the rear end of the local train had passed his box, but he could not tell where the front end of the construction train was at that time; that he did not notice any calls or shouting because it was quite a noisy place there from the trains and passing vehicles; that most of the vehicles went up 14th street.

And thereupon the defendant, by its counsel, announced its testimony closed.

And thereupon the plaintiff, in rebuttal, called CHARLES J. CUMBERLAND, who testified that he had a conversation with Mr. Phillips, the gate-tender, at the corner of 13½ street and Maryland avenue, a day or two after the accident, and that Phillips told him that when the engine stopped the engineer came over to his box and asked him if he had struck something, and he said he thought he had struck a little girl.

And thereupon counsel on both sides announced their testimony closed.

And thereupon the defendant, by its counsel, upon all the evidence hereinbefore set forth, which was all the evidence given by the respective parties and which is hereby referred to and made a part hereof, prayed the court to instruct the jury to return a verdict for the defendant; but the court overruled said motion and refused to so instruct the jury; to which ruling of the court the defendant, by its counsel, then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

57 And thereupon the plaintiff, by his counsel, prayed the court to instruct the jury as follows, which the court accordingly did:

1. The jury are instructed that if they find that the injuries received by the plaintiff on the evening of the 10th of December, 1894, by being run over by a locomotive on the defendant's railroad track on Maryland avenue, in the city of Washington, were caused by negligence of some person or persons in the employ of the defendant company, then the plaintiff is entitled to a verdict, unless the jury further find from the evidence that the plaintiff's own negligence contributed to the injury; and in determining whether the injury was caused by the negligence of the defendant's employés or any of them the jury have a right to take into consideration the facts (1) that the railroad tracks at the point where the accident occurred were not protected by a fence, as required by the regulation

of the District Commissioners, which is in evidence; [(2) whether the speed of the train by which the plaintiff was injured was excessive under all the circumstances of the case;]* (2) *whether the light at the front end of the train was substantially such a light as required by the regulation of the District* of *Commissioners given in evidence or such a light as was requisite to give proper warning of the approach of the train;* [(3) the admitted failure to have at the front end of the train a headlight or other reflecting light;]* (3) the distance passed over by the train after it struck the plaintiff before it was brought to a stop, and (4) all the evidence in the case tending to show
58 whether or not the persons in charge of the engine drawing the train were keeping a proper lookout, *and the jury will consider all the evidence in the case bearing upon these questions.*

2. In considering the question whether the plaintiff was guilty of contributory negligence the jury are instructed that the rule of the law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years are quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited on another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child. That is to be determined in this case by the circumstances of this particular case.

To the granting of which prayers and each of them the defendant, by its counsel, interposed and objected; but the court overruled said objection, and said prayers were given to the jury; to which ruling of the court the defendant, by its counsel, duly excepted, and said exception was noted at the time upon the minutes of the court.

And thereupon the defendant, by its counsel, prayed the court to instruct the jury as follows, which the court accordingly did:
59 1. Unless the jury shall be satisfied from the evidence that the defendant's agents [in charge of the train which struck the plaintiff]* were guilty of negligence, the plaintiff cannot recover, and in that case the verdict must be in favor of the defendant.

Granted.

3. If the jury shall be satisfied from the evidence that just before the accident the plaintiff approached the railroad tracks of the defendant, not at a crossing, but between 13½ and 14th streets, carrying a ladder, and that he stepped on the track in front of the (having first looked and listened)
advancing engine and train without [either looking or listening]* for such engine and train, and that he was in consequence injured, [and]* he is not entitled to recover, *provided* that the agent of the defendant in charge of the engine, as soon as he discovered that the

[* Matter enclosed in brackets erased in copy.]

plaintiff was about to step upon the track, used reasonable care and diligence to avoid said accident.

Granted.

5. Every engineman in charge of a locomotive engine running on and along a railroad track in the city of Washington who sees a person walking towards such track has the right to assume that such person will not go upon such track in front of such engine, but, on the contrary, such engineman is authorized to assume that such person will stop before going into a place of danger, *provided that if the engineman shall discover that such person is about to go into a place of peril he uses due care and diligence to avoid an accident.*

Granted.

60 7. On the declaration in this cause the plaintiff, if entitled to recover at all, cannot recover for any injury except the loss of his arm and the pain and suffering incident to that injury.

Granted.

And thereupon the defendant, by its counsel, prayed the court to instruct the jury as follows:

2. If the jury shall be satisfied from the evidence that the plaintiff was a dull boy mentally, and that he was not as bright or mentally capable of taking care of himself as boys of his age usually are, and that his father sent him to light gas lamps in the locality where the accident occurred, and that it was necessary in the performance of such work to cross over several railroad tracks of the defendant after or about nightfall, and that in attempting to cross such railroad tracks at the time in question, not at a crossing, but between 13½ and 14th streets, the plaintiff received the injury complained of, he cannot recover, and the verdict must be for the defendant.

Refused. *d.*

Exception by defendant.

4. If the jury shall be satisfied from the evidence that a lighted lantern was at the time of and before the accident hanging upon the end of the tender approaching towards and nearest the plaintiff, and that the bell of the engine was kept ringing from the time the engine left "Long bridge" to the time of the accident, and that several of the employés of the defendant called to the plaintiff and warned him in a voice loud enough to be heard by him

61 before he stepped on the track in front of the advancing train, then and in that case the plaintiff, on his declaration in this cause, cannot recover, and the verdict must be in favor of the defendant.

Rejected.

Exception by defendant.

6. If the jury shall be satisfied from the evidence that a lighted lantern was suspended on the end of the engine which was being "backed" into the city before and at the time of the accident, then and in that case it is immaterial, under the declaration in the case, whether or not such lighted lantern fulfilled the requirements of the police regulations on that subject.

Rejected.

Exception by defendant.

But the court refused to grant said prayers or any of them; to which ruling of the court the defendant, by its counsel, then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

62 And thereupon the court voluntarily and of its own motion instructed the jury as follows:

The COURT: Gentlemen of the jury, there has been some reference by counsel to the question of the plaintiff here. There are two persons named in the suit as plaintiffs, for the suit is brought in the name of this boy by his father, as his next friend. The names of both appear in the declaration, and, in one sense, they are both plaintiffs. The father, however, is the nominal plaintiff, while the boy is the real beneficial plaintiff, and the boy alone would be entitled to any recovery that might be had in the case. The father would have no interest in it and no right to it; but should there be a verdict for the defendant, the father is liable for costs, and the judgment for costs would be against the father. It could not be against the boy. That is the legal aspect of the case.

However, so far as the question of interest is concerned in weighing the evidence, the father would be considered as an interested party. I had occasion some days ago, perhaps, to instruct you in relation to the weight of evidence, that it was right to consider the interest a person might have or his or her situation in regard to the suit or relation to the parties to the suit, whether in the employ of them or related to them by blood or marriage; and although the father is not entitled to the recovery, still the relation which he sustains to this boy and to the suit would be proper for you to consider in determining the weight to be attached to his evidence.

You have tried several cases involving the question of negligence and contributory negligence, so I need not trouble you with
63 restating the general principles applicable to such an action; but I will proceed at once to read to you the instructions as they have been prepared by counsel in the main, with some slight modifications by the court.

The first one that I read to you is one granted on behalf of the defendant. It is numbered 1 in the defendant's series, and reads in this way:

"Unless the jury shall be satisfied from the evidence that the defendant's agents were guilty of negligence, the plaintiff cannot recover, and in that case the verdict must be in favor of the defendant."

That is the statement of the general principles in all actions for negligence. The right to a verdict depends, in the first place, upon the question whether the defendant was guilty of negligence that caused the injury; therefore, unless you find from the evidence that the defendant was guilty of negligence, your verdict would be for the defendant without inquiring any further.

But if you should find that the defendant was guilty of negligence, then, before you could determine whether your verdict should be for the plaintiff or for the defendant, you would have to

consider the further question of whether the plaintiff was guilty of contributory negligence; for if the plaintiff be guilty of contributory negligence, he cannot recover, although the defendant was guilty of negligence. In other words, the plaintiff must show, in order to be entitled to a verdict, that the defendant only was guilty of negligence, and that such negligence solely caused the accident.

64 In this connection I will read to you an instruction granted on behalf of the plaintiff, numbered 1 in the plaintiff's series. It reads in this way:

"The jury are instructed that if they find that the injuries received by the plaintiff on the evening of the 10th of December, 1894, by being run over by a locomotive on the defendant's railroad track on Maryland avenue, in the city of Washington, were caused by the negligence of some person or persons in the employ of the defendant company, then the plaintiff is entitled to a verdict, unless the jury further find from the evidence that the plaintiff's own negligence contributed to the injury; and in determining whether the injury was caused by the negligence of the defendant's employees or any of them the jury have a right to take into consideration the facts (1) that the railroad tracks at the point where the accident occurred were not protected by a fence, as required by the regulation of the District Commissioners, which is in evidence; (2) whether the light at the front end of the train was substantially such a light as required by the regulations of the District Commissioners, given in evidence, or such a light as was requisite to give proper warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff before it was brought to a stop, and (4) all the evidence in the case tending to show whether or not the persons in charge of the engine drawing the train were keeping a proper lookout, and the jury will consider all the evidence in the case bearing upon these questions."

You will see, gentlemen, that that instruction recites four distinct suggestions, which you may consider in determining whether
65 the defendant was guilty of negligence. The first one relates to the question of the fence. It is admitted that there was no fence here at this point. The regulations of the District Commissioners, which is in evidence before you, requires generally that there shall be a fence. The court does not undertake to instruct you, and you are not to so understand the instruction, that because there was no fence there you are therefore to find that the railroad company was guilty of negligence. The court does not so instruct you, but submits to your judgment whether the fact of the fence shall be considered negligence in this case. That is a question of fact; but in determining whether the absence of the fence is negligence you are to consider that the Commissioners required it, and that they had the right to require it, and that it was not there. You have also the right to and should consider the evidence that has been given tending to show that it was impracticable to put a fence there, and you are to consider whether, under all the facts and circumstances of this case, considering the situation, the fact of not

having a fence there shall be considered negligence on the part of the railroad company. If you think it was impractical to build a fence there, and that they could not manage the road reasonably with a fence there, then it would not be negligence in not having it there, although the District Commissioners' regulations required it. The proper construction of that regulation is that the fence should be placed at all points where it was practicable to put it and not interfere with the operation of the road; and you will consider that regulation and the facts of this case in the light of that instruction I have given you. It is for you to say whether the absence
66 of the fence is negligence under the circumstances of this case.

The next point that is submitted to your consideration on the question of negligence of the defendant is whether the light at the front end of the train was substantially such a light as was required by the regulations of the District Commissioners, given in evidence, or such a light as was requisite to give proper warning of the approach of the train. The regulation of the District Commissioners required a light of a particular character. It is not absolutely necessary that the light should be exactly like the light that the District Commissioners require. If it was substantially like it, that would be a compliance with the regulations. And even if it was not substantially like it, yet if you believe from the evidence that the light was a proper and sufficient one to give warning of the approaching train, it would not be negligence simply because it did not correspond with the kind of light that the Commissioners required, the object of that regulation of the Commissioners being that railroad companies should have a light that would be sufficient in kind and character to give warning of an approaching train. And if you find that the railroad company had such a light as that it would not be guilty of negligence; but if it had a light that was insufficient to give warning of the approaching train, then it would be negligence, and that is submitted for your consideration.

And so as to the question of the distance that was passed over by the train after it struck the plaintiff. You first have to ascertain how far the train did go after it struck him, and then consider that fact after you have found it upon the question of negligence as to whether it satisfies you that they were guilty of negligence
67 in running the train because of the distance that the train ran after it struck the boy.

And, lastly, as to the evidence tending to show whether the persons in charge of the engine drawing the train were keeping a proper lookout; that is for your consideration also. The court does not undertake to tell you that they did look out, or that they did not look out, or that what lookout they kept was sufficient or insufficient. It is for you to ascertain from the evidence what lookout they actually did keep and whether that was sufficient to satisfy you that there was no negligence on the part of the railroad company in that regard.

Upon the question of whether the railroad company was guilty of negligence, the burden is upon the plaintiff to satisfy you by a

preponderance of evidence—that is to say, the evidence tending to show that the railroad company was guilty of negligence in some one or more of the particulars mentioned should be weightier in your judgment than the evidence tending to show the contrary.

After having determined whether the railroad company was guilty of negligence, if you should find that it is, it will be necessary for you to consider the question of contributory negligence. If you find that it is not, then you would be relieved from considering the question of contributory negligence, because upon finding that the railroad company was not guilty of contributory negligence, resulting in the injuries mentioned, your verdict would be for the defendant without further consideration; but if you determine against the defendant in that regard, then you would have to determine whether there was contributory negligence on the
68 part of the plaintiff before you would determine which way your verdict would be, and in that connection I read to you an instruction granted at the request of the counsel for the defendant, which is No. 3 in their series and reads in this way:

"If the jury shall be satisfied from the evidence that just before the accident the plaintiff approached the railroad track of the defendant, not at a crossing, but between 13½ and 14th streets, carrying a ladder, and that he stepped on the track in front of the advancing engine and train without having first looked and listened for such engine and train, and that he was in consequence injured, he is not entitled to recover, *provided* that the agent of the defendant, in charge of the engine, as soon as he discovered that the plaintiff was about to step upon the track, used reasonable care and diligence to avoid said accident."

Then, as bearing upon the same point, I give you another instruction at the request of counsel for the defendant, numbered 5 in their series. It reads in this way:

"Every engineman in charge of a locomotive engine running on and along a railroad track in the city of Washington who sees a person walking towards such track has the right to assume that such person will not go upon such track in front of such engine, but, on the contrary, such engineman is authorized to assume that such person will stop before going into a place of danger, *provided* that if the engineman shall discover that such person is about to go into a place of peril he uses due care and diligence to avoid an accident."

As bearing upon this question of contributory negligence
69 in this particular case, there is an instruction which has been granted at the request of counsel relating to the age of the plaintiff and what consideration is to be given to that. It is numbered 2 in the plaintiff's series of instructions, and reads in this way:

"In considering the question whether the plaintiff was guilty of contributory negligence the jury are instructed that the rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years are quite different. By the adult there must be given that care and attention for his own protection that

is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of a child. That is to be determined in this case by the circumstances of this particular case."

It is important to observe the whole of that instruction, gentlemen. The last clause of it is as important as any, and that is "that is to be determined in this case by the circumstances of this particular case." You are to consider, in determining whether you will hold this boy to the diligence of an adult or not, the circumstances of the case; and perhaps I should say to you, that you may not misunderstand, the court does not undertake to tell you that you are to require less of this boy than you would of an adult or that you are to treat him as an adult. That is left to you. You
70 are to say, under all the facts and circumstances of this case, whether he should be treated as an adult in this case or that he should be treated as a boy or a child having less discretion and judgment than an adult.

There has been some evidence given here tending to show that the boy is dull, and in some particulars, perhaps, has not the capacity of boys of his age, or had not at the time of this accident. That is a question for you to determine, and it might be that a boy would be dull so far as books or learning are concerned, and yet he might be an adult so far as other matters are concerned. You are not to consider him in reference to any particular thing except this accident and the circumstances of it; what were his capacity and knowledge and intelligence about railroad trains and railroad tracks, and does the evidence satisfy your mind that he had as much judgment and discretion about avoiding an accident as an adult? If it does, you should treat him as an adult. But if the evidence satisfies your mind that he had not the judgment and discretion of an adult about these particular matters, but had less, you should treat him in that way. It is all for you to determine upon that point.

If, under the instructions that have been given to you, you find for the defendant, the question of damages does not arise. But if you find for the plaintiff, then you have to consider the amount, and upon the question of the measure of damages one instruction has been granted on behalf of the defendant, which reads in this way:

71 "On the declaration of this cause the plaintiff, if entitled to recover at all, cannot recover for any injury except the loss of his arm and the pain and suffering incident to that injury."

You will remember that there was some evidence tending to show some other injuries, but, under the circumstances, I have concluded to give this instruction: That the measure of damages will relate only to the pain and suffering caused by the injury to the

arm and the loss of the arm. The elements are: the physical pain occasioned by the injury to the arm, the pain suffered while it was being cured, and the mental pain arising from and growing out of that physical injury, and then the loss of the arm, the present loss and the future loss, and the permanent injury to the party on account of the loss of the arm. Those are the elements that make up the damage.

Upon that question you are the sole judges. Of course, it is right and proper that the parties or their counsel may suggest the amount to which they think this boy is entitled, but any suggestion from counsel or parties is not evidence. It is proper for your consideration in connection with the evidence, but it is not evidence and not binding upon you. You are to use your own judgment in relation to it. The law requires that if the party is entitled to recover he should be given a full and fair compensation for his injuries and suffering, but nothing more. You would not be justified in going beyond fair compensation to him by increasing the damages by way of punishment to the railroad company. If the company is liable, it is liable simply for compensatory damages; and, as I said before, that should be full and fair, but nothing beyond that.

72 Of course, I need not say to you, gentlemen, that neither the condition of the parties here nor sympathy should enter into your consideration. You are to determine the case upon the evidence you have heard, and give such verdict as in your judgment the evidence requires at your hands.

Mr. WORTHINGTON: I wish to make one or two suggestions to your honor. In the first instruction on behalf of the defendant it is stated that "unless the jury find that there was negligence on the part of the agents of the defendant *in charge of the train*," the plaintiff could not recover. It had not occurred to me before that that would be inconsistent with that your honor said about the fence, and also with the testimony which has been given by the operator.

The COURT: Yes; that should be struck out.

Mr. WORTHINGTON: I suppose your honor meant to have it read that if we are bound to prove negligence it is on the part of the defendant's agents causing the injury. I had not noticed that or I would have called your honor's attention to it before now.

The COURT: The language is, "unless the jury shall be satisfied from the evidence that the defendant's agents in charge of the train" were guilty of negligence, &c. The words "in charge of the train" should be stricken out.

Mr. WORTHINGTON: The jury will understand that, I suppose.

The COURT: Yes; unless the jury shall be satisfied from the evidence that the defendant's agents were guilty of negligence, the plaintiff cannot recover.

Mr. WORTHINGTON: The operator, for instance, testified that it was his duty to see whether or not the proper lights were on the trains.

73 Now, I wish to except to what your honor said about the jury having a right to consider the evidence tending to show that it was impracticable to have a fence at this point on two grounds: One, that there is no evidence upon which it could be based, as the civil engineer himself testified that he did not know why there could not have been a fence there with an opening large enough for that switch; and also because of what I think your honor probably has not noticed in the testimony, that that applied only to a fence on the south of the track. There was no suggestion that the fence could not have been put on the north side of the tracks, and in fact there has been one since put there, and it is there now.

The COURT: Yes; but I had reference in what I said to the south side of the track. That is where the accident occurred.

Mr. WORTHINGTON: Still, if there had been a fence on the north side persons might have been deterred from attempting to cross from the south.

The COURT: Yes.

Mr. WORTHINGTON: Then I wish also to except to what your honor said about the regulation of the Commissioners in reference to the light required in front of the train. It seems to me that goes a little too far. I wish to except to what was said about what would be a sufficient light, even if it was not such a light as was required by the regulations.

I wish also to suggest—and I have no doubt your honor will so instruct the jury as soon as I make the suggestion—that, so far as the question of contributory negligence is concerned, the burden is on the defendant to establish that.

74 The COURT: Yes; it is on the defendant. If the jury find negligence on the part of the defendant, then the burden is on the defendant to show contributory negligence in the plaintiff in order to prevent him from recovering.

Mr. TOTTEN: But it is to be taken from all the evidence.

The COURT: They m*a*ke take it from all the evidence. They may consider the plaintiff's evidence and the evidence of the plaintiff's witnesses, as well as that of the defendant, in determining that question.

Mr. TOTTEN: If the plaintiff's evidence shows that the plaintiff was guilty of contributory negligence, that is just as well as if it was our own.

The COURT: Just as well as if it was shown by some witnesses for the defendant.

Mr. WORTHINGTON: I suppose we had better have a repetition of exceptions to the prayers. Each of us takes an exception to each of the instructions granted to the other side.

The COURT: Yes. I have marked the prayers accordingly. Wherever I have refused or granted a prayer I have marked an exception.

Mr. WORTHINGTON: We are considered as repeating the exception when it was given in the formal charge.

Mr. TOTTEN: If your honor please, I also except to the allowance of the two prayers to the plaintiff in the form in which they were

written, and also to your honor's comments, in the first place, as to the subject-matter of a light on the advancing or front end of the backing engine and tender. I do not think that question ought to be submitted to the jury at all upon the pleadings.

The COURT: You think the court should instruct the jury
75 that they cannot consider that question in determining whether there was negligence or not?

Mr. TOTTEN: Yes, sir; that the question of lights had nothing to do with it.

Mr. WORTHINGTON: That is covered by his exception.

Mr. TOTTEN: The allegation of the declaration is that there was absolutely no light on that train at all.

The COURT: Yes.

Mr. TOTTEN: I also object and except to what your honor says to the jury in reference to the different degrees of care required of an adult and of a child or one under age.

I would like to have your honor instruct the jury that if this boy did look towards this train and saw it, and then got upon the track in front of the advancing train and was hurt, he cannot recover.

Mr. WORTHINGTON: I will grant that, your honor.

The COURT: Yes; I think we all agree about that.

Mr. WORTHINGTON: I do not think the jury needs to be told that.

And thereupon the defendant, by its counsel, interposed and objected to that part of the court's charge which referred to the subject-matter of a light on the advancing or front end of the backing engine or tender, on the ground that the declaration alleged that there was absolutely no light there at all; which said part of the charge is as follows:

"The next point *is* submitted to your consideration on the question of negligence of the defendant is whether the light at the front
end of the train was substantially such a light as was re-
76 quired by the regulations of the District Commissioners given in evidence, or such a light as was requisite to give proper warning of the approach of the train. The regulation of the District Commissioners required a light of a particular character. It is not absolutely necessary that the light should be exactly like the light that the District Commissioners require. If it was substantially like it that would be a compliance with the regulations. And even if it was not substantially like it, yet if you believe from the evidence that the light was a proper and sufficient one to give warning of the approaching train, it would not be negligence simply because it did not correspond with the kind of light that the Commissioners required, the object of the regulation of the Commissioners being that railroad companies should have a light that would be sufficient in kind and character to give warning of an approaching train. And if you find that the railroad company had such a light as that, it would not be guilty of negligence, but if it had a light that was insufficient to give warning of the approaching train, then it would be negligence, and that is submitted for your consideration."

And thereupon the defendant, by its counsel, further interposed and objected to that part of the court's charge in reference to the different degrees of care required of an adult and of a child, or one under age; which said part of the charge is as follows:

"It is important to observe the whole of that instruction, gentlemen. The last clause of it is as important as any, and that is, 'that is to be determined in this case by the circumstances of this particular case.'

77 You are to consider, in determining whether you will hold this boy to the diligence of an adult or not, the circumstances of the case. And perhaps I should say to you, that you may not misunderstand, the court does not undertake to tell you that you are to require less of this boy that you would of an adult, or that you are to treat him as an adult. That is left to you. You are to say, under all the facts and circumstances of this case, whether he should be treated as an adult in this case or that he should be treated as a boy or a child, having less discretion and judgment than an adult.

There has been some evidence given here tending to show that the boy is dull and in some particulars, perhaps, has not the capacity of boys of his age, or had not at the time of the accident.

That is a question for you to determine, and it might be that a boy would be dull so far as books or learning are concerned, and yet he might be an adult so far as other matters are concerned. You are not to consider him in reference to any particular thing, except this accident and the circumstances of it; what were his capacity and knowledge and intelligence about railroad trains and railroad tracks, and does the evidence satisfy your mind that he had as much judgment and discretion about avoiding an accident as an adult? If it does, you should treat him as an adult, but if the evidence satisfies your mind that he had not judgment and discretion of an adult about these particular matters, but had less, you should treat him in that way. It is all for you to determine upon that point."

To which foregoing portions of the charge and each of them the defendant, by its counsel, duly and severally excepted, and said exceptions were noted at the time upon the minutes of the court.

78 And be it further remembered that each of the separate and several exceptions taken by counsel for the defendant to each of the separate and several rulings of the court during the progress of the said trial was so taken by counsel for the defendant then and there before the jury retired, separately and severally, and said exceptions were and each of them was then and there separately and severally duly entered upon the minutes of the justice presiding at the trial, and counsel for the defendant then and there prayed the court and now prays the court to sign and seal this bill of exceptions, to have the same force and effect as if each of the said exceptions was separately and severally set forth in a separate bill of exceptions, and — the request of said counsel for the defendant the same is accordingly signed and sealed and made a part of the

record in this cause, now for then, this 2nd day of February, A. D 1898.

CHAS. C. COLE,
Asso. Justice. [SEAL.]

Settled by counsel this 2nd day of February, A. D. 1898.

A. S. WORTHINGTON,
For Plaintiff.
ENOCH TOTTEN,
For Defendant.

(Here follows map marked p. 79.)

80 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 79, inclusive, are true copies of originals in cause No. 37720 at law, wherein Charles E. Cumberland, by his next friend, is plaintiff and The Baltimore and Potomac Railroad Company is defendant, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 8th day of February, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 778. The Baltimore and Potomac Railroad Company, appellant, *vs.* Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland. Court of Appeals, District of Columbia. Filed Feb. 11, 1898. Robert Willett, clerk.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

43 FRIDAY, *April 15th, A. D.* 1898.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Appellant,
vs.
CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland. } No. 778.

The argument in the above-entitled cause was commenced by Mr. J. S. Flannery, attorney for the appellant, and was continued by Mr. A. S. Worthington, attorney for the appellee, and was concluded by Mr. Enoch Totten, attorney for the appellant.

44 THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Appellant,
vs.
CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland. } No. 778.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

The appellee, Charles E. Cumberland, a boy a little over twelve years of age at the time of the accident which gave occasion for this suit, was injured on the railroad track of the appellant, The Baltimore and Potomac Railroad Company, on December 10, 1894, by being knocked down and run over by an engine and tender of the company drawing a train of cars on Maryland avenue, in the city of Washington. The train had come across the Long bridge from Virginia, and was being moved northeastwardly along Maryland avenue towards the station a few minutes after five o'clock in the afternoon of the day mentioned. It was what is known as a work-train, carrying materials and laborers in the employment of the company. The engine and tender drawing the train were reversed, so that the tender was in advance of the engine, and the head of the engine was turned towards the train which it was drawing. It was a rainy, misty evening; and it was after dark, or at least getting so dark that the engineer of the engine, as he testified in the suit, was unable to distinguish objects fifty feet ahead of him. The headlight of the engine, being turned backwards toward the train, was of course invisible to the front of it; but hanging on the tender and intended as a signal was a hand lamp, such as is frequently used by the trainmen on the rear of trains and in and around the stations. As usual in such cases, the witnesses differ greatly as to the speed at which the train was moving, one witness testifying that it was at the rate of about six miles an hour, and another witness that the rate was from twelve to fifteen miles an hour.

The father of the young plaintiff, who appears in the suit as his next friend, was a lamplighter in the service of the District government, and was employed to light the gas lamps on the streets of the locality in which the accident occurred. Being incapacitated to some extent by defective or failing eyesight, he employed the boy

to help him in the performance of his duties; and the boy had been so employed for about a year before the occurrence of the accident. About five o'clock of the afternoon or evening mentioned, the boy had lit the gas lamp about the middle of the block on the south side of Maryland avenue, between Thirteen-and-a-half and Fourteenth streets; and thereupon proceeded directly across the avenue, as it seems he had been in the habit of doing, to light the corresponding lamp on the north side of the avenue, carrying on his shoulders a ladder which he used for the purpose.

At this part of the avenue there are four or five, or perhaps six, railroad tracks—two main tracks on the north side, used for passenger trains; a third to the south of these two, used for freight trains, and which was the one on which the accident occurred; south of that a track diverging eastwardly into the freight station of the Richmond and Danville Railroad Company to the south of the avenue; and still further south, and south even of the gas lamp which the boy had lit, a switch diverging from the east into a private coal yard. And it may be added that about the place of the accident, and thence westward towards Fourteenth street, the tracks begin to curve so as to reach the Long bridge at the foot of that street, and that, to the south, beyond the inner side of this curve and about the line of Fourteenth street, there is a switchman's box, which to some slight extent obstructs the view from the east of trains coming to the avenue from the bridge.

As the boy had passed or was passing the Richmond and Danville track, and was approaching the freight track, his attention was directed to a passenger train going out on the northernmost track towards the bridge. When this had passed he proceeded on his way across, and having stepped on the freight track, he was struck, knocked down, and injured by the tender attached to an engine drawing the work-train, which was coming east, and which he states that he had not seen, although he testifies that he had looked in that direction, and had listened for approaching trains, and had neither seen nor heard any. He was taken out from under the engine and taken to the hospital, his injuries resulting in the loss of his arm, which was amputated at the hospital. At the time of the accident there seems to have been considerable noise and confusion on the street, caused by the return of numerous vehicles from the races which were taking place at the time in Virginia, beyond the Long bridge; and there was considerable contrariety in the testimony as to the shouts claimed to have been made to warn the boy of his danger. And there is also considerable contrariety in the testimony with reference to the distance to which the boy could see or be seen, in consequence of the mist and darkness.

At the trial of the case in the court below the testimony on both sides seems to have been adduced without much controversy
45 as to its admissibility; and no question is presented to us in that regard. But there were introduced in evidence certain regulations made by the Commissioners of the District of Columbia, under authority of law, the reasonableness of which is not ques-

tioned, but of which the application is greatly brought in question. These regulations are the following:

"Whenever the grade of a steam-railroad track is approximately even with the adjacent surface, the line of the road shall be securely inclosed on both sides with a substantial fence, and all grade crossings or intersections of any steam-railroad tracks with streets or avenues shall be securely guarded by a suitable gate or guard, erected and maintained by the company owning or operating such track."

"Between sunset and sunrise of each day, a headlight, or other equivalent reflecting lantern to give due warning to persons near or crossing steam-railroad tracks of the approach of trains, locomotives or cars, shall be displayed upon the advancing end of every train of steam-railroad cars, and of single steam-railroad cars and locomotives not in trains, when moving in the District of Columbia. It shall be unlawful for any person to set in motion, or run or operate any train of railroad cars, single railroad cars or locomotives without the said display of such lights or lanterns."

"Steam cars, trains or engines shall not move upon any street or avenue at a greater rate of speed than twelve miles an hour, and no steam car, train or engine shall be stopped or held at a street crossing or intersection so as to obstruct the passage of vehicles or foot passengers for a longer period than is needed for the passage of such steam car, train or engine at a speed of not less than five miles an hour."

These regulations or ordinances were in force at the time of the occurrence of the accident which gave rise to this suit; and two of the three are insisted upon by the plaintiff as entering into the question of the defendant's alleged negligence. The third, however,—that in reference to the rate of speed,—seems to have been abandoned by the plaintiff in view of the insufficiency of the testimony adduced to show a violation of its provisions.

Upon the conclusion of the testimony, the whole of which is substantially set forth in the record, the defendant requested the court, upon the whole evidence, peremptorily to instruct the jury to return a verdict for the defendant; which request was refused, and the refusal is made the basis of one of the assignments of error before us.

Other requests for instructions were then presented by both sides; two on behalf of the plaintiff, which were granted, and seven on behalf of the defendant, three of which were granted and four refused. Error is assigned only on the allowance of the two instructions requested by the plaintiff, and on the refusal of two of the rejected instructions requested on behalf of the defendant, all of which will be noticed in their order.

The case was submitted to the jury; and there was a verdict for the plaintiff in the sum of $8,000, upon which there was judgment. From this judgment the defendant has prosecuted the present appeal.

1. That the defendant's request for a peremptory instruction to the jury to find a verdict for the defendant, was properly refused, is a proposition that requires no great consideration from us. Clearly there was testimony that should go to a jury both upon the question

of the defendant's negligence and upon that of the plaintiff's contributory negligence. To go on farther, on the one side, than the alleged violation of the municipal ordinances that have been cited by the defendant, a question of fact for the jury was there plainly presented. It was a question of fact for the jury, whether, with reference to the first of those ordinances, the grade of the railroad was approximately even with the adjacent surface, so as to preclude the necessity of inclosing the tracks by a fence. It is argued that, because there was a curb outside of the tracks about eight inches above the surface of the roadway of the street, and because the tracks about the place of the accident were about eighteen inches above the adjacent curb, the tracks were not approximately even with the adjacent surface, and no fence was required; and it is argued, also, that on the south side of the track a fence was impracticable on account of the divergence of the Richmond and Danville track or switch. But it is evident that the alleged elevation of the tracks above the adjacent surface was no barrier against temptation to cross the tracks, which was the very thing against which the ordinance sought to guard; for the plaintiff had been in the habit of crossing there for a year before the accident, apparently with the knowledge of the officers of the railroad company in charge at the place, and certainly without protest or objection by them, so far as the record discloses. And the record discloses the fact that, subsequently to the occurrence of the accident, the defendant constructed a fence on the north side of the track, such as was required by the ordinance, and which presents an effectual barrier against crossing the tracks. Certainly, it was more favorable to the defendant to let the question go to the jury to determine whether this disregard of the ordinance was in fact a violation of it, than for the court to decide, as a question of law, that there had not been compliance by the defendant with the ordinance; and the same observation is proper in regard to the other ordinance and the matter of a signal light on the advancing end of the engine or tender. But it is due to the appellant to say that no great reliance is placed upon this point, either in the brief or in the argument. Greater reliance is placed upon the questions raised by the other assignments of error, in connection with which the contributory negligence, with which it is sought to charge the plaintiff, may be considered.

2. The next assignment of error to be considered is that the trial court refused to hold, as matter of law, that the plaintiff was bound to exercise the same degree of care and prudence that an adult would have been bound to exercise under like circumstances.

It is not perhaps entirely correct to say, as is here implied, by the appellant, that there was any such refusal by the court below as intimated. The court was not requested by the defendant to make any such ruling; and, of course, it could not refuse what it
46 was not requested to do. But it did, on behalf of the plaintiff, and in the second instruction requested by the plaintiff, lay down the converse of the rule. That instruction is in the following words:

"In considering the question whether the plaintiff was guilty of

contributory negligence, the jury are instructed that the rule of the law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years are quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited on another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child. That is to be determined in this case by the circumstances of this particular case."

And to this instruction as requested by the plaintiff and as given by the court with some explanations, which do not in any manner materially alter it, the defendant excepted; and such exception may be regarded as a sufficient basis for the assignment of error now made.

In support of the contention in this regard, the appellant cites numerous cases in which, as it claims, children, varying in age from five to thirteen years, have been held, as matter of law, guilty of contributory negligence. But it is unnecessary for us to consider those cases. One or two of them may support the appellant's proposition; and that there may be cases where, upon the clear and uncontradicted evidence, even an infant of tender years may be held, as matter of law, to the result of his own acts as negligence or contributory negligence, may be conceded, as was conceded in the case of MacMahon *v.* Northern Central Railway Co., 39 Md., 438, 449. But that is not the proposition here advanced by the appellant. The proposition here is, that for the purpose of determining whether a plaintiff, a child of the age of about twelve years, is liable to the charge of contributory negligence, he is to be held precisely to the same degree of care and prudence that an adult would have been bound to exercise under the circumstances. In answer to the proposition it seems to us to be sufficient to say that it is directly in the face of the decision of the Supreme Court of the United States in the case of Railroad Co. *v.* Gladmon, 15 Wall., 401, from the opinion in which the plaintiff's instruction excepted to has been taken *verbatim*. The rule laid down in that case was reiterated by the same court in the case of Railroad Co. *v.* Stout, 17 Wall., 660; and we are not advised that it has ever been modified in any respect. That rule we have been called upon to apply in several cases in this court. Railroad Co. *v.* Falvey, 5 App. D. C., 176; Railroad Co. *v.* Webster, 6 App. D. C., 182; Reiners *v.* W. & G. R. Co., 9 App. D. C., 19. And we must regard it as decisive of the question now raised. As we have intimated, the question raised under this assignment of error is not whether, under all the circumstances of this case, the plaintiff, as matter of law, should be adjudged to have been guilty of contributory negligence; but whether, under circumstances to be submitted to a jury for determination of the issue of contributory negligence, the jury should be instructed that there was no difference between

an adult and a child of tender years with regard to such issue. It would be error so to hold; and there was no error in holding the reverse.

3. The appellant's third assignment of error is founded upon the allowance by the trial court of the first instruction requested by the plaintiff to be given to the jury. That instruction is in the following words:

"The jury are instructed that if they find that the injuries received by the plaintiff on the evening of the 10th of December, 1894, by being run over by a locomotive on the defendant's railroad track on Maryland avenue, in the city of Washington, were caused by the negligence of some person or persons in the employ of the defendant company, then the plaintiff is entitled to a verdict, unless the jury further find from the evidence that the plaintiff's own negligence contributed to the injury; and in determining whether the injury was caused by the negligence of the defendant's employees or any of them the jury have a right to take into consideration the facts, (1) that the railroad tracks at the point where the accident occurred were not protected by a fence, as required by the regulation of the District Commissioners, which is in evidence; (2) whether the light at the front end of the train was substantially such a light as required by the regulation of the District Commissioners, given in evidence, or such a light as was requisite to give proper warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff before it was brought to a stop, and (4) all the evidence in the case tending to show whether or not the persons in charge of the engine drawing the train were keeping a proper lookout, and the jury will consider all the evidence in the case bearing upon these questions."

To this instruction exception was taken, on the ground that it was not based upon any sufficient testimony in the case, and that it was, in part at least, inconsistent with the allegations of the declaration. That the instruction is inaptly drawn, is loose in its phraseology and grammatical construction, and is perhaps to some extent misleading, seems to be quite clear; and if it stood alone, there might be grave question whether it would not warrant a reversal of the judgment. It refers to certain suggestions for consideration as being *facts*, when only one of the matters suggested could, with any propriety of language, be so characterized; and even that one seems to assume that the failure of the railroad company to construct a fence at the place of the accident was an act of negligence *per se*, without reference to the question of its practicability or to the question whether the relation of the tracks at that place to the adjoining surface of the roadway justified the application thereto of the ordinance in regard to fencing. But the instruction does not stand alone; it was given to the jury by the court with an explanation so clear and ample as to leave no doubt of its meaning.

47 The court informed the jury that they were not to understand from the instruction that the mere failure to keep a fence at this point should be regarded as being *per se* an act of negligence; but that it was for the jury to determine, under all the circum-

stances of the case, whether it was practicable and proper to have a fence at that point. Similarly in regard to the signal light upon the engine, the jury were told that the failure of the company to provide such a light for the engine as was required by the regulation of the Commissioners would not be an act of negligence, if the light that was there was a proper and sufficient one to give warning of the approach of the train. The instruction, so construed and explained, was as favorable to the defendant as it could reasonably expect.

The third and fourth suggestions of the instruction seem to be based upon the opinion of the Supreme Court of the United States in the case of The Grand Trunk R'w'y Co. *v.* Ives, 144 U. S. 408, 427; but it is argued that there was here no testimony to support them. Precisely the same argument, on the same grounds, was made in that case; and if, in this regard, there is any difference between that case and this, we fail to find it. There the Supreme Court, by Mr. Justice Lamar, said:

"But it is claimed that the last paragraph of that portion of the charge last above quoted, referring to the question whether or not the trainmen kept a proper lookout and managed the train in a prudent and cautious manner, was erroneous, because, so it is claimed, 'there was no evidence that the train hands kept no proper lookout, &c.' This contention is also without merit. There was evidence that the ordinary signals of blowing the whistle and ringing the bell at the crossing were not given, and that the train was running at a more rapid rate than was permitted by the city ordinance. If the jury believed that evidence, they must necessarily have found that the trainmen did not keep a proper lookout, and did not manage the train in a prudent and careful manner."

4. The refusal of the trial court to grant the sixth instruction requested by the defendant is the ground for the fourth and last assignment of error that is urged upon us. That instruction was in the following words:

"If the jury shall be satisfied from the evidence that a lighted lantern was suspended on the end of the engine which was being 'backed' into the city before and at the time of the accident, then and in that case it is immaterial, under the declaration in this case, whether or not such lighted lantern fulfilled the requirements of the police regulations on that subject."

Under the exception to the refusal of this instruction, and to some extent also under the exception to the granting of the first instruction requested by the plaintiff, which we have just considered, the theory of the appellant seems to be that there was a fatal variance between the plaintiff's declaration and the proof in the case. It is argued that the allegation of the declaration is that there was no light on the rear part of the engine, which was the part that was moving forward; and that, as the testimony shows, and may be assumed to show conclusively, that there was a lighted lantern on such rear part, this element of a light is entirely eliminated from the controversy. But we do not understand the allegation of the declaration to be as claimed in this argument. The words of the

declaration are that "there was no light on the rear part of said engine to indicate its approach," and the reasonable intendment of this statement is, not that there was no light at all upon the rear part of the engine, but that there was no such light as would indicate its approach. And it was left to the jury, as already stated, to determine whether there was such a light, regardless of the fact that it may not have conformed to the regulation of the Commissioners. This was as favorable to the defendant as it had any good reason to expect; and the sixth instruction requested by the defendant was properly rejected.

We find no error in the record of this case that, in our opinion, would justify a reversal of the judgment; and that judgment must therefore be *affirmed, with costs. And it is so ordered.*

48 TUESDAY, *May 3d, A. D.* 1898.

THE BALTIMORE AND POTOMAC RAILROAD Company, Appellant,
vs.
CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland.
No. 778, April Term, 1898.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

May 3, 1898.

49 THURSDAY, *May 5th, A. D.* 1898.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Appellant,
vs.
CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland.
No. 778.

On motion of Mr. J. S. Flannery, attorney for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving supersedeas bond in the sum of twelve thousand dollars.

50 Know all men by these presents that we, The Baltimore and Potomac Railroad Company, as principal, and John Cassels, as surety, are held and firmly bound unto Charles Emmet Cumberland in the full and just sum of twelve thousand dollars, to be paid to the said Charles Emmet Cumberland, his certain attorney,

executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Charles Emmet Cumberland, by his next friend, Charles J. Cumberland, and The Baltimore and Potomac Railroad Company, a judgment was rendered against the said The Baltimore and Potomac Railroad Company, and the said The Baltimore and Potomac Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles Emmet Cumberland, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said The Baltimore and Potomac Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, [SEAL.]
By ENOCH TOTTEN, *Att'y-in-fact.*
JOHN CASSELS. [SEAL.]

This bond is satisfactory.
A. S. WORTHINGTON,
Att'y for Appellee.

Approved by—
R. H. ALVEY,
Chief Justice.

[Endorsed:] No. 778. The Baltimore and Potomac Railroad Company, appellant, *vs.* Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland. Supersedeas bond on appeal to S. C. U. S. Court of Appeals, District of Columbia. Filed May 9, 1898. Robert Willett, clerk.

51 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The Baltimore and Potomac Railroad Company, appellant, and Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland, appellee, a manifest error hath happened, to the great damage of the said appellant, as by its

complainant appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal Court Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

52 UNITED STATES OF AMERICA, *ss:*

To Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Baltimore and Potomac Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 9th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted May 10, 1898.

A. S. WORTHINGTON,
Attorney for Def'd't in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 10, 1898. Robert Willett, clerk.

53 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 52, inclusive, contain a true copy

of the transcript of record and proceedings of said Court of Appeals in the case of The Baltimore and Potomac Railroad Company, appellant, *vs.* Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland, No. 778, April term, 1898, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 24th day of May, A. D. 1898.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,898. District of Columbia Court of Appeals. Term No., 31[illegible] The Baltimore and Potomac Railroad Company, plaintiff in error, *vs.* Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland. Filed May 31, 1898.

No. 87.

FILED
DEC 16 1899
JAMES H. McKENNEY,
Clerk.

Br. of McKenney, Flannery & MacVeagh for P. C.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Dec. 16, 1899. No. 87

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
For Plaintiff in Error.

WAYNE MACVEAGH,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-15-'99

IN THE

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THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief of Argument on Behalf of Plaintiff in Error.

INTRODUCTION.

This action, begun in the supreme court of the District of Columbia, involves the right of the infant plaintiff, who was twelve (12) years and four (4) months old at the time of the occurrence complained of, to recover damages for personal injuries inflicted upon him by the alleged negligence of the defendant company. The plaintiff was a street lamp lighter by occupation, and for more than a year prior

to the accident had, by the direction of his father, who brings this suit as his next friend, been engaged in lighting street lamps in the vicinity of the defendant company's tracks on Maryland avenue S. W., in the city of Washington. On the evening of the accident, December 10, 1894, about dark, the weather being "misty," according to some of the witnesses, and "rainy, foggy, and very cold," according to others, the plaintiff, in the course of his usual rounds, having lighted a lamp on the south side of Maryland avenue, midway between Thirteen-and-a-half and Fourteenth streets S. W., started to cross Maryland avenue for the purpose of lighting a lamp directly opposite on the north side of the street. At this point there was no crossing for pedestrians or vehicles, and the street on either side of the defendant company's right of way was separated therefrom by curbs which projected eight inches above the surface of the adjacent street or roadway. These curbs were distant about five feet from the outer rails of the main tracks on either side, and the tracks themselves were carried on an elevated structure eighteen inches higher than the top of the curbs, or two feet two inches higher than the surface of the street. Having crossed over a spur or side track and come within the curb line upon the company's right of way, which was separated from the street roadway, as above stated, plaintiff climbed upon the elevated structure in front of an advancing train and *just as he stepped upon the track* was struck, knocked down, and run over, and the injuries complained of resulted.

The engine drawing the train was backing into the city—that is, having its tender in front. On the forward end of the tender was swung a hand signal lantern of the kind usually used for such purpose, and at the time of the accident it was burning brightly. The engineer and fireman were keeping their accustomed watch on the tracks ahead, and testified that the engine bell was rung, the engine reversed, and the power brakes put on as soon as plaintiff's intention to cross the tracks was suspected, and, further, that

the train immediately before the accident was moving at the rate of eight to ten miles an hour only,—considerably less than was permitted by the municipal regulations.

The engineer testified that when he was between Fourteenth street and the place where the accident happened he saw the form of a person moving at a brisk walk in the direction of the tracks about fifteen feet away from them and about fifty or sixty feet in front of the train. He could not tell whether it was a man or boy. When in the neighborhood of thirty feet away he saw he was coming so near the track that he thought probably he was going to walk on it. He then reversed the engine and applied the brake to stop, and the train was brought to a standstill within the distance of eighty or ninety feet.

The fireman testified that when he first saw the boy "he was approaching the track in a brisk walk, and was about fifteen or twenty feet from the track, making his way north. He appeared to be looking across towards the moving train on the south-bound main track. He was carrying some object (a ladder). He saw him put his foot on the end of the ties, and he (witness) called the engineer's attention by 'hollering.'"

A switchman and a by-stander, who were near the scene of the accident, seeing the boy approach the tracks and apparently about to cross in front of the advancing train, "hollered" and otherwise sought to attract his attention and warn him of his peril, but without effect.

The plaintiff made no attempt to prove that the defendant and its servants did not do everything possible to be done to obviate the accident from the moment there was reasonable ground to believe that the plaintiff was about to venture upon the track.

Defendant proved by positive uncontradicted evidence that its servants in charge of the engine and stationed in the immediate vicinity of the scene of the accident did everything in their power to prevent the occurrence.

Under these circumstances it is submitted as matter of law that the plaintiff was a trespasser upon the tracks of the defendant and is without legal right to recover against it for injuries inflicted by the passing train. Railroad companies owe to trespassers upon their tracks no duty save that of refraining from inflicting upon them wanton and wilful injuries.

STATEMENT OF THE CASE.

It appears from the record (5–30), which contains all the evidence given on the trial (30), that at the time of the accident, viz., December 10, 1894, Charles J. Cumberland, the father and next friend of the infant plaintiff, together with said plaintiff, was residing at No. 228 thirteen-and-a-half street S. W., in this city. The father was a street lamplighter in charge of a large route, and, being in ill health and afflicted with failing eyesight, required his son, the plaintiff, to assist him in lighting the lamps (15), assigning to the boy that portion of the route which was about the railroad tracks, and reserving for his own attention other portions situated in a less dangerous locality (14, 16). For a year or more prior to the accident plaintiff had been attending to the lamps on the portion of the route so assigned to him (8).

Plaintiff was born August 26, 1882 (8), and at the date of the accident was within a few days of being twelve years and four months old. About 5 o'clock in the afternoon of the day of the accident, having lighted a lamp situated in the middle of the square between Thirteen-and-a-half and Fourteenth streets, on the south side of Maryland avenue (6, 11), it being the last lamp on that side of the avenue he had to light (9), he started to cross the avenue to light the next light, which "was across the street from this (last) one—right straight across" (8). At this point it appears that there was an unobstructed view of the tracks for several hundred feet in both directions, and particularly in the direction of the

Long bridge (17, 26), and there was no obstacle between the plaintiff and the train that struck him (28). The plaintiff testified that when about twenty-five feet from the south track he looked in both directions (6, 7) for approaching trains. He saw an outbound passenger train on the northernmost track (7) and waited for it to pass, then proceeded on his way across the avenue toward the next lamp, and the next thing he remembered he was lying in bed in a hospital, with his arm cut off (8). He did not see the train that struck him, nor did he hear any warning bells or any one call out to him (10). He did not see the engine that inflicted the injuries upon him nor hear its approach, and he was struck just as he stepped upon the track (13, 25, 28).

The defendant proved, without any attempt on plaintiff's part at contradiction, that its right of way on Maryland avenue between the streets above designated was marked and separated from the street roadway by curbs on either side of its main tracks (19); that these curbs projected about eight inches above the surface of the roadway; that at Thirteen-and-a-half street the tracks and curbs are both flush with the level of the street, but midway of the square between Thirteen-and-a-half and Fourteenth streets "the tracks are a foot and a half above the curb, making them two feet two inches above the roadway" (20). At the time of the accident the crossing gates at the Thirteen-and-a-half-street crossing, on both sides, were down (27), and the lights in the neighborhood were sufficient to render objects readily visible (28, 29).

The engineer, Bush, testified that he saw the form of a person approaching the tracks, and when he approached so near that it seemed probable "he was going to walk on it" he "reversed the engine and applied the brake to stop (11, 21) and rang the bell" (22). Both witness and the fireman were "watching where they were going" (21). The train was moving at the rate of eight or ten miles an hour (21), and came to a stop within 80 or 90 feet (22). The fire-

man, Maddox, corroborated the testimony of the engineer (23, 24), and further stated that there was a hand lamp on the advancing end of the tender that gave a good light.

Counsel for the plaintiff offered in evidence police regulations in force in the District of Columbia at the time of the accident, requiring—

> 1. That "whenever the grade of a steam railroad track is approximately even with the adjacent surface" the line of the road shall be securely closed on both sides with a substantial fence.
>
> 2. That "between sunset and sunrise of each day, a headlight, or other equivalent reflecting lantern," * * * shall be displayed upon the advancing end of every train of steam railroad cars * * * when moving in the District of Columbia; and
>
> 3. "Steam cars * * * shall not move upon any street or avenue at a greater rate of speed than twelve miles an hour." * * *

The trial justice, despite the objection of defendant's counsel, permitted plaintiff to prove that at the time of the accident the line of the railroad at the point of accident was not protected by a fence, though one could have been constructed along the north side of the tracks and actually was so constructed after the accident and before the trial; to all of which defendant duly excepted (20, 21).

Both sides having rested, defendant moved the court, upon all the evidence, to instruct the jury to return a verdict in its favor, which motion was overruled and an exception noted (30).

Thereupon the plaintiff prayed the court to instruct the jury as follows:

> 1. The jury are instructed that if they find that the injuries received by the plaintiff on the evening of the 10th of December, 1894, by being run over by a loco-

motive on the defendant's railroad track on Maryland avenue, in the city of Washington, were caused by negligence of some person or persons in the employ of the defendant company, then the plaintiff is entitled to a verdict, unless the jury further find from the evidence that the plaintiff's own negligence contributed to the injury; and in determining whether the injury was caused by the negligence of the defendant's employés or any of them the jury have a right to take into consideration the facts (1) that the railroad tracks at the point where the accident occurred were not protected by a fence, as required by the regulation of the District Commissioners, which is in evidence; (2) whether the light at the front end of the train was substantially such a light as required by the regulation of the District Commissioners given in evidence or such a light as was requisite to give proper warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff before it was brought to a stop, and (4) all the evidence in the case tending to show whether or not the persons in charge of the engine drawing the train were keeping a proper lookout, and the jury will consider all the evidence in the case bearing upon these questions.

2. In considering the question whether the plaintiff was guilty of contributory negligence the jury are instructed that the rule of the law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years are quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited on another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child. That is to be determined in this case by the circumstances of this particular case.

These prayers, over defendant's objections, were granted by the court, and exceptions to such rulings were duly noted (31).

The defendant then prayed the court to instruct the jury as follows (22):

> 2. If the jury shall be satisfied from the evidence that the plaintiff was a dull boy mentally, and that he was not as bright or mentally capable of taking care of himself as boys of his age usually are, and that his father sent him to light gas lamps in the locality where the accident occurred, and that it was necessary in the performance of such work to cross over several railroad tracks of the defendant after or about nightfall, and that in attempting to cross such railroad tracks at the time in question, not at a crossing, but between 13½ and 14th streets, the plaintiff received the injury complained of, he cannot recover, and the verdict must be for the defendant.
>
> 4. If the jury shall be satisfied from the evidence that a lighted lantern was at the time of and before the accident hanging upon the end of the tender approaching towards and nearest the plaintiff, and that the bell of the engine was kept ringing from the time the engine left "Long bridge" to the time of the accident, and that several of the employés of the defendant called to the plaintiff and warned him in a voice loud enough to be heard by him before he stepped on the track in front of the advancing train, then and in that case the plaintiff, on his declaration in this cause, cannot recover, and the verdict must be in favor of the defendant.
>
> 6. If the jury shall be satisfied from the evidence that a lighted lantern was suspended on the end of the engine which was being "backed" into the city before and at the time of the accident, then and in that case it is immaterial, under the declaration in the case, whether or not such lighted lantern fulfilled the requirements of the police regulations on that subject.

each of which prayers was denied by the court, and exceptions to such rulings were duly noted.

Thereupon the court voluntarily and of its own motion, after reading to the jury plaintiff's prayer numbered one (1), in form as above set forth, instructed the jury as follows (34):

"You will see, gentlemen, that that instruction recites four distinct suggestions, which you may consider in determining whether the defendant was guilty of negligence. The first one relates to the question of the fence. It is admitted that there was no fence here at this point. The regulation of the District Commissioners, which is in evidence before you, requires generally that there shall be a fence. * * * In determining whether the absence of the fence is negligence (on part of defendant) you are to consider that the Commissioners required it, and that they had the right to require it, and that it was not there (34). * * * If you think it was impracticable to build a fence there, and that they could not manage the road reasonably with a fence there, then it would not be negligence in not having it there, although the District Commissioners' regulations required it. * * * It is for you to say whether the absence of the fence is negligence under the circumstances of this case" (35).

"The next point that is submitted to your consideration on the question of negligence of the defendant is whether the light at the front end of the train was substantially such a light as was required by the regulations of the District Commissioners" (35). * * *

"And so as to the question of the distance that was passed over by the train after it struck the plaintiff. You first have to ascertain how far the train did go after it struck him, and then consider that fact after you have found it upon the question of negligence as to whether it satisfies you that they were guilty of negligence in running the train because of the distance that the train ran after it struck the boy" (35).

"And lastly, as to the evidence tending to show whether the persons in charge of the engine drawing the train were keeping a proper lookout; that is for your consideration also" (35). * * *

To all of which defendant duly noted exceptions (39, 41).

The jury returned its verdict in favor of the plaintiff for $8,000 (4), and defendant's motion for a new trial having been overruled, judgment was entered accordingly (4).

Upon appeal to the Court of Appeals of the District of Columbia this judgment was affirmed (50).

ASSIGNMENT OF ERRORS.

1. Upon the whole evidence the verdict should have been in favor of the defendant, and the refusal of the trial justice so to instruct the jury was erroneous (30).

In this connection, the refusal of the trial justice to grant defendant's second prayer (32) and the granting of plaintiff's second prayer (31) is also assigned as error.

2. It was error on the part of the trial justice to refuse to instruct the jury as requested in defendant's fourth and sixth prayers (32), the variance between the allegations of the declaration and the proof rendering the requests for such instructions proper.

3. Plaintiff's first prayer, as granted and given to the jury, was improper in form and bad in substance, as was also so much of the general charge of the court given in explanation thereof as is above set forth ; all of which is also assigned for error.

ARGUMENT.

Upon the facts disclosed by the record, and in the absence of any evidence tending to show that the injuries complained of were inflicted by the defendant or its servants wantonly or maliciously, the jury should have been instructed to return its verdict for the defendant.

It is settled that a railroad company owes no duty to a trespasser upon its tracks or premises other than that which every person owes to another—that is, to refrain from inflicting upon him a willful or malicious injury. If a person be seen lying upon the track, in season to stop the train, the company is not warranted in running him down simply because he is a trespasser there, but it is bound to use all care to prevent the injury if possible. If, after becoming aware of the trespasser's presence, the engineer fails to exert every reasonable effort to prevent the infliction of injury upon him, the company may rightfully he held answerable, but *except at highway or street crossings* the company's right to the use of its tracks and premises, including its right of way, is exclusive, and its agents and servants have the right to assume that they are clear. It is not bound to anticipate that persons will violate its property rights and go upon its tracks, and owes no duty to provide for the safety of such trespassers, and this rule is as applicable to the case of an infant trespasser as to that of an adult. The rule thus broadly stated is subject perhaps to some modification or exception where the tracks are laid in and form a part of the streets of a city, permitting the ready passage over them of pedestrians and vehicles, as well as trains of cars, but such exception has no place in this case, where it plainly appears that at the point where plaintiff attempted to cross

the tracks there was no established crossing, and the tracks were elevated more than two feet above the surface of the adjacent roadway or street, and further separated therefrom by heavy curbs sunk into the roadway about five feet outside of the outer rails and projecting eight inches above the surface of the street.

Plaintiff was well acquainted with the locality and the relative position of the defendant's tracks and the street at that point. He knew the dangers incident to the crossing which he intended to make, and testified that he looked both ways before stepping upon the track. He saw a south-bound passenger train moving out on the track farthest from him and waited for it to pass, but failed to see an incoming train on the track nearest to him, though no obstacle interposed between him and it to obscure his view. In addition to looking he testified he also listened, but failed to hear the noise of the approaching work-train. He climbed upon the elevated structure supporting the tracks and was at once struck and run over by the latter train.

In excuse of plaintiff's conduct it was sought to be proved that defendant failed to display a proper headlight and neglected to ring the engine bell, but even had defendant failed in such particulars, and assuming for the moment that the tracks had been on a level with the surface of the street, the language used by this court in disposing of the case of Railroad Company *vs.* Houston (95 U. S., 697, 702) would seem to end any contention of liability based thereon. There it was said :

> "Negligence of the company's employés in these particulars" (failure to whistle or ring the bell) "was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted

to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

This language was quoted with approval in the recent case of Northern Pacific R. R. Co. *vs.* Freeman (174 U. S., 379, 383), where it was also said that—

"When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in the face of oral testimony (to the contrary), that such precautions were taken. * * *

"If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence."

In Cullen *vs.* Railroad Company (8 App. D. C., 69), where the plaintiff was between 14 and 15 years old at the time of the accident, it was said:

"Whatever may have been the negligence of the defendant railroad company in failing to enclose its tracks with a fence, as would seem to have been required by law; or in leaving a dangerous hole or excavation in its tracks; or in running its engine at an unlawful rate of speed, if it did so run it on this occasion; or in its failure to ring the bell or otherwise to give notice of the approach of the engine; or in the failure of the engineer to keep a proper lookout in the direction in which his engine was moving, *it is very*

evident that there was contributory negligence on the part of the unfortunate victim of the accident, which wholly precludes any recovery by the plaintiff in this action, unless it is made to appear that the deceased was in some way relieved from the legal consequences of his own negligence."

In Johnson *vs.* B. & M. R. R. Co. (125 Mass., 75), where the plaintiff had been injured through the negligence of the defendant while crossing its tracks at a place not a regular crossing, it was said that as the plaintiff might "have crossed the tracks at a highway crossing, he is a trespasser, and cannot, in the absence of evidence that the negligence *was willful*, maintain an action for the injury, although the defendant's platforms extend between two highways crossing the tracks, and people had been accustomed to pass from the station on one railroad to that on the other at that point without objection by the corporation."

In Nicholson *vs.* Erie R. R. Co. (41 N. Y., 525), plaintiff's intestate was run over and killed by defendant's cars while he was crossing the tracks not at a public crossing, although persons had been accustomed to cross there without objection; it was held that the action could not be maintained, and so in the case of Mason *vs.* Missouri Pac. R. R. Co. (27 Kan., 83), where plaintiff's wife was injured by defendant's cars while walking over an elevated trestlework which carried defendant's tracks across a creek within the city limits, it was said that—

> "As there was no attempt to show that either the injured party or any other person was invited by the company to cross or travel upon the structure over the creek, or that the injured party was upon the structure with the consent of the company, the fact that other parties had crossed upon it did not make it less dangerous or less negligent for the wife of the plaintiff to attempt to do so. * * * The embankment and the

trestle-work are so much elevated above the street, and are so erected for the purpose of operating thereon cars and engines only, as to apparently forbid foot passengers crossing the creek at this place." * * *

And the right to recover damages from the company for her injuries was denied.

In Union Pacific R. R. Co. *vs.* Rollins (5 Kan., 98) it was held that in the case of trespassers the company is liable only for negligence so gross as to amount to wantonness, and in Baltimore, &c., R. R. Co. *vs* Depew (40 Ohio St., 121) it was said that the negligence causing the injury must have been willful, otherwise plaintiff cannot recover.

In Cauley *vs.* Railway Co. (95 Penna. St., 398) it is said that—

"Except at street crossings, where the public has a right of way, a railroad company has the right to a clear track, and it owes no duty to trespassers, whether they be aduits, minors, or children of tender years.

"We live in an age of steam and rapid development. The world demands rapid transportation. Increased speed involves increased danger. Holding railway corporations to a strict responsibility for negligence, it is our duty to give them a clear track. This rule is not only proper in itself, but is necessary for the preservation of life. Its propriety is no longer a subject for discussion."

That such rule is applicable to trespassers upon railroad tracks within city limits, but not imbedded in or level with the city streets, is aptly illustrated by several well-considered cases.

In Glass *vs.* M. & C. R'y Co. (94 Ala., 582), wherein was involved the right to recover for the death of a woman who, while walking along defendant's tracks in the streets of a

populous city, was killed by being run over by one of defendant's trains, it was held that a person walking upon a railway track was a trespasser, and—

"Such an one is essentially and at all times a trespasser, if he be not there by the sanction of the company; and he is as much a trespasser whether he stop and look and listen before going on the track or not, nor is his attitude as trespasser relieved by the utmost diligence and care to avoid injury. In all reason and by every analogy which the law affords he must act upon his own peril; the company owes him no duty except refraining from willful or wanton injury after his presence and peril become known. And this doctrine applies as well to densely populated neighborhoods as to the country; to the streets of a city or a town and to the solitudes of the plains and forests."

Where a railroad track running along a city street is not incorporated therewith and imbedded therein so as to be at the same level as the roadway, "the public has no more right to use it than if it were not in a street at all."

"And the mere fact that persons living in the neighborhood have customarily used the railway track as a footway, without objection by the company, does not alter the duty of the company toward such persons. They are simply trespassers.

"In the case at bar the plaintiff, being wrongfully at the place where she was injured, was a naked trespasser, wholly regardless of any precautions she may have taken before going on the track, or while proceeding thereon. Her negligence and wrong in being there would, as a matter of law, and to be so declared by the court, be a complete defense in this case, so far as defendant's liability is attempted to be rested on the mere negligence of its employés."

Glass *vs.* R. R., *supra.*

So in Montgomery *vs.* Ala. R. R. Co. (97 Ala., 305) where a man walking along a railroad track in an alley of a town was killed by the defendant's train, it was held that as the track was not so imbedded in the ground as to form part of the roadway, the plaintiff was a trespasser on defendant's

property at the time of the accident, and consequently the defendant owed him no duty until it became aware of his presence, and there being no evidence of wanton recklessness on the part of the defendant, the plaintiff could not recover.

In L. & N. R. R. Co. *vs.* Hairston (97 Ala., 351) it was held that:

If a railway track is in a public road or street and so incorporated therewith as to form part of the roadway itself, as, for instance, where no part of the track or road-bed of the railway is above the surface of the street and only the rails are visible, and they on a level with the street, thus inviting the public to use the track of the railway as a part of the street, a person may have the right to walk thereon if he use due care; but one who walks along the track of a railroad which is not imbedded in and does not form part of the public streets of a town is a trespasser.

And this principle is stated in many other cases in the Alabama courts which are referred to and relied on in the cases here cited.

To like effect are the following cases:

Railway Company *vs.* Goldsmith, 47 Indiana, 43.
McLaren *vs.* Railroad Co., 83 Indiana, 319.
Palmer *vs.* Railroad Co., 112 Indiana, 250.
Dull *vs.* Railroad Co., 52 N. E. Rep., 1013.
Tenenbrock *vs.* Railway Co., 59 California, 269.
Toomey *vs.* Railway Co., 86 California, 374.
Masser *vs.* Railway Co., 68 Iowa, 602.
Galena, &c., R'y Co. *vs.* Jacob, 20 Illinois, 478.
Ill. Cent. R'y Co. *vs.* Godfrey, 71 Ill., 500.
Same *vs.* Hetherington, 83 Ill., 510.
Railway Co. *vs.* Zoffinger, 10 Ill. App., 252.
Moore *vs.* Wabash R'y Co., 84 Missouri, 481.
Dahlstrom *vs.* Railway Co., 96 Missouri, 99.

Barker *vs.* Railway Co., 98 Missouri, 50.
Candelaria *vs.* Atch., Top. & S. F. R'y Co. (New Mex.), 27 Pac. Rep., 497.
B. & O. R. R. Co. *vs.* State, 62 Maryland, 479.
Johnson *vs.* B. & M. R. R. Co., 125 Massachusetts, 75.
Wright *vs.* B. & M. R. R. Co., 129 Massachusetts, 440.
Morrisey *vs.* Eastern R. R. Co., 126 Massachusetts, 377.
Mugford *vs.* B. & M. R. R. Co., 52 N. E. Rep., 1078.
Flower *vs.* Penn. R. R. Co., 69 Penna. St., 210.
Duff *vs.* Railroad Co., 91 Penna. St., 458.
Railroad Co. *vs.* Schwindling, 101 Penna. St., 258.
McMullen *vs.* Railroad Co., 132 Penna. St., 107.
Cauley *vs.* Railway Co., 95 Penna. St., 398.
Moore *vs.* Penna. R. R. Co., 99 Penna. St., 301.
Beers *vs.* Railway Co., 19 Connecticut, 566.
Nolan *vs.* Railway Co., 53 Connecticut, 461.
Spicer *vs.* C. & C. R'y Co., 34 W. Virginia, 514.
Cristy *vs.* Railway Co., 35 W. Virginia, 117.
State *vs.* B. & O. R'y Co., 16 Atl. Rep., 210.
Johns' Adm'r *vs.* L. & N. R. R. Co., 10 S. W., 417.
May *vs.* Central R'y of Ga., 4 S. E. Rep., 330.

and many other cases too numerous for citation here.

It is immaterial whether the person injured while trespassing upon railroad tracks be an adult or infant of tender years. The rule above established applies with equal force in either case and as certainly bars a recovery.

In *Moore vs. Penna. R. R. Co.* (99 Pa. St., 301) an intelligent boy ten years old was walking on the ends of the sleepers of defendant's track *laid in a public street in a populous neighborhood.* There was an ample sidewalk on each side of the track. He was struck and killed by a rapidly passing train, and a nonsuit was sustained.

Per Curiam: "Of course, in such circumstances he was a trespasser, and not only put himself in peril by his rashness but also endangered the safety of any passing trains and the lives of passengers. We have so frequently held that in such circumstances there can be no recovery, that it is unnecessary to quote the authorities. As the testimony was undisputed it was the duty of the court to pass upon it, which they did by directing a nonsuit. In this there was no error. The circumstance that the trespasser in this instance was a boy of ten years of age cannot affect the application of the rule. The defendant owed him no greater duty than if he had been an adult. They are not subject to an obligation to take precautions against any class of persons who may walk along their tracks."

In Phila., &c., R. R. Co. *vs.* Hummell (44 Penna. St., 375), where the infant injured was but seven years of age, it was said:

"If the use of a railroad track is exclusively for its owners or those acting under them; if others have no right to be upon it and are wrong-doers whenever they so intrude, the company and its servants are under no obligations to take precautions against possible injuries to those intruding. Ordinary care such companies must be held to, but they have a right to act upon the presumption that those in the vicinity will not trespass upon the right of a clear track and that even children of a tender age will not be there—for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act."

In *Dull vs. Railroad Co.* (Ind. Sup. Ct., 1898; 52 N. E. Rep., 1013) a child seven years of age wandering upon railway tracks in the city of Muncie, Indiana, was injured by a railway train moving at a speed in excess of that permitted by the city ordinances. It was there said:

"That a child over seven years of age and of sufficient intelligence to know the difference between danger and

safety is a person *sui juris* so as to be chargeable with contributory negligence resulting in her being struck by a train; and one who has wandered upon a railway track, though but seven years old, is a trespasser, for injuries to whom the railroad company is not liable when such injuries were caused merely by its negligence."

In *Railroad Co. vs. Bradford* (Ind. Sup. Ct.; 49 N. E. Rep., 388) it appeared that a child of two years of age had wandered upon the defendant's unfenced tracks in the city of Washington, Indiana, and was there injured.

Held, that a child two years of age is *non sui juris*, but its age will not prevent its becoming a trespasser upon a railroad. A statute requiring cautionary signals from trains approaching street crossings was intended solely for the protection of persons approaching such crossings, and has no application to a child trespassing at a distance therefrom, though if such signals had been given they might have averted the accident.

In the case of *Masser vs. Railway Co.* (68 Iowa, 602) it appeared that a boy eleven years old had been injured while trespassing upon certain railroad tracks within the limits of the city of Iowa. It was held that one who walks or plays or lounges upon the track of a railway is a trespasser; and when one who is trespassing upon the track of a railroad company is injured by a passing train he cannot recover on account of any negligence of the company, except negligence of its employees in not trying to avoid the accident *after* discovering the danger, and the mere fact that such train at the time of the accident was running at a rate faster than allowed by a city ordinance does not *per se* alter the rights of the parties.

"And a boy *eleven years* old knows as well as an adult what a railroad is, and the use to which it is put, and the consequence to a person who should be struck by a passing train, and is not of such tender years as not to be charge-

able with contributory negligence. It seems not improbable that this boy might have been discovered a little sooner, but no locomotive engineer is bound to watch out for trespassers upon the track. The company does not owe trespassers that kind of care. This has been settled by repeated adjudications.

"The general rule that persons walking on a railroad track or so near as to receive injury are guilty of carelessness is a healthy rule, and the practice of walking on them is not to be protected and encouraged by frittering the rule away."

In *Morrissey vs. Eastern R. R.*, 126 Mass., 377, a child four years old was killed by a train of the defendant. There was evidence to show that at the point of the accident there existed a foot path which was in common use; that the dangers incident to the use of this path had been complained of to an agent of the company; also that the approaching train gave no warning signal either by bell or whistle.

It was there held that "the plaintiff at the time of the accident was a mere intruder and trespasser upon the railroad track. No inducement or implied invitation to him to enter upon it had been held out. He was neither a passenger nor on his way to become one, but was there merely for his own amusement and was using the track as a playground. The defendant corporation owed him no duty except the negative one not maliciously or with gross carelessness to run over him."

In *Wright vs. Railroad Co.* (142 Mass., 296) a child seven years old was injured while crossing the defendant's tracks. It was shown by the plaintiff that at the point where the accident occurred a foot path crossed the tracks, which for many years had been in daily use with the knowledge of the company's servants.

It was held that a mere permission or license from a railroad company to cross its tracks was not an invitation,

and "as the plaintiff was on the track without right, and there is no evidence of willful or reckless misconduct on the part of the defendant, the action cannot be maintained."

In *Mugford vs. B. & M. R. R. Co.* (Mass. Sup. Ct.; 52 N. E. Rep.. 1078) a boy 11½ years old was injured while stealing a ride on defendant's train. Held, that the plaintiff was guilty of a deliberate and intentional trespass, and consequently could not recover, except for wanton injury. This accident occurred in the city of East Boston, Massachusetts, and in the course of its opinion the court remarked that "the plaintiff cannot ask us to say that if a fence had been there it might have changed his purpose, and therefore that the absence of the fence is the cause of his misfortune."

In *McMahon vs. Nor. Cent'l R. Co.* (39 Md., 438) a child five years and nine months old, in attempting to pass under a car slowly moving along the street, was run over and seriously injured. *Held*, he was not entitled to recover damages from the company for the injury sustained, as his attempt to pass under the moving car was such an act of carelessness as amounted in law to contributory negligence; and so it was also held in *Schwier vs. N. Y., &c., R. R. Co.* (15 Hun., 572), where the boy injured was under four years old.

In *Ex parte Stell* (4 Hughes [U. S. C. C.], 157) the injured child was seen on the railroad track by the engineer of the approaching train and everything was done to stop the train, without success. Common brakes only were used. Held, there was no evidence of negligence on the part of the defendant company to submit to the jury.

In *Wendell vs. N. Y. Central & C. R. Co.* (91 N. Y., 420) plaintiff's intestate, seven years old, attempting to cross the track in front of a moving train, fell, and was struck by

the engine and killed. The case was submitted to the jury, who found for plaintiff. On appeal, held that contributory negligence had been shown and a nonsuit should have been entered.

In *Hestonville R'y Co. vs. Connell* (88 Pa. St., 520), where the injured child was but six years old, the court said:

"It may be assumed that a child old enough to be trusted to run at large, has wit enough to avoid ordinary danger, and so persons who have business on the streets may reasonably conclude that such an one will not voluntarily thrust himself under the feet of his horses or under the wheels of his carriage, *a fortiori*, may they conclude that they are not to provide against possible damages that may result to an infant from its own willful trespass."

And in *Cauley vs. Railway Co.* (95 Penna. St., 398), where the injured boy was but seven years old, it was said:

"It ought to be equally well understood that parents who permit their children to trespass upon the track of a railroad are guilty of negligence. It is not only gross but culpable negligence, as it imperils the lives of the children so trespassing, as also the lives of the traveling public. It too often happens that boys are allowed to trespass upon railroad tracks, and while so engaged injuries are likely to happen, and it would be unjust to compel a corporation or an individual to make a pecuniary compensation for such accident, when it was the result of a lawful pursuit of a lawful business by such corporation or individual. The father owes the child the duty of protection, the company does not."

In *B. & O. R. R. Co. vs. Schwindling* (101 Pa., 258) it appeared that a child of six years was injured while loitering upon the platform of a railway station. *Held*, that as the child was not a passenger and had no business with the company or its agents, he was a trespasser upon its property, and the fact that he was a child of tender years did not alter the duty of the railroad company to him in the

premises, and therefore render the company liable to him.

"It is entirely immaterial whether the person injured is an adult or a child; the company would owe the plaintiff no duty if he were an adult, how then can it be otherwise because he is a child?"

And referring to the earlier case of *Railroad Co. vs. Hummell (supra)*, the court further said:

"A jury cannot hold a party to a higher standard of duty than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty."

In the case of Nolan *vs.* Railway Co. (53 Conn., 461) it appears that two children, respectively seven and ten years of age, were injured while crossing the defendant company's tracks in the streets of a city at a place other than a regular street crossing. In disposing of the case the court said:

"A railroad company is under no obligation to locate its tracks and adjust the running of its trains with reference to the safety of persons unlawfully on its right of way, and is not required to fence its tracks against trespassers. Fences are required along its tracks to protect animals, not rational, intelligent beings.

"The tender age of the person injured can have no effect to *raise a duty* where none otherwise existed. Where certain duties exist, infants may require greater care than adults, but precautionary measures for the protection of the public must, as a rule, have reference to all classes alike (men, women, and children)."

This, then, was the state of the law when defendant's counsel, upon the entire evidence introduced at the trial, moved for a verdict. It cannot be denied that plaintiff was a trespasser upon the tracks of defendant; that he was injured while doing that which ordinary care and prudence forbade his doing, and at a place where he had no business

with the company and not the slightest right to be. There was not a scintilla of evidence tending to show that defendant's servants omitted doing anything that might have averted the accident and prevented the infliction of the injury after plaintiff's peril was apprehended.

This case is readily distinguishable from the case of Railroad Company *vs.* Gladmon (15 Wall., 401) and that of Railroad Company *vs.* Stout (17 Wall., 657), upon both of which plaintiff relies and the opinion and judgment of the Court of Appeals largely depend. In the former case, a child seven years old attempted to run across certain street railway tracks which were imbedded in and formed a part of a street in a populous portion of the city of Washington. He was injured by the horses of an approaching car, the driver of which was talking to a person standing beside him upon the platform, and for such purpose had turned himself "so as to look at a right angle to the course in which he was driving." The record before this court showed no testimony but that of one witness, who testified "that if the driver had not been looking at his companion he could have checked the horses in time to have prevented the accident."

Upon this state of facts the court submitted to the jury the question of the contributory negligence of the child, and the propriety of such action in cases presenting substantially similar conditions or facts is no longer open for discussion; but there is a wide difference between the attempt of a seven-year-old child to cross street railway tracks forming a portion of the general surface of the street roadway in front of an approaching horse car and the attempt of a thirteen-year-old boy in the performance of a man's duties to cross the elevated tracks of a steam railroad which formed no portion of the surface of the street roadway and were separated therefrom by a granite curb

eight inches in height, assuming that both attempts were made at other than recognized crossings.

In the Stout case, a child six years of age, wandering about in an aimless manner with two other boys nine and ten years of age respectively, came upon the defendant company's grounds near a traveled highway and not separated from adjoining properties by any visible barrier. It was proposed that they should play with a turn-table belonging to the company, which was on its own premises, but was unenclosed, not "guarded by any servant or agent, was not fastened or locked, and revolved easily on its axis." It appeared that children were in the habit of playing with the turn-table, and this fact was known to the company's servants. Plaintiff was injured, and it was held that in submitting the question of negligence on the part of the defendant railway company in the management or condition of its turn-table to the jury the charge complained of was correct, this court saying:

"It is well settled that the conduct of an *infant of tender years* is not to be judged by the same rule which governs that of an adult." * * *

"That the turn-table was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff, * * * and the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case."

But in the case at bar no such question nor any akin thereto arises. Here the plaintiff, so far from being of *tender years*, was approaching man's estate and doing a man's work. There was nothing about the company's tracks at that point to attract the plaintiff or others to play thereon or to arouse their curiosity. His sole purpose in going upon the tracks was to serve his own convenience and shorten his hours of labor. It was not to be presumed that a boy

twelve years old would thrust himself in front of an advancing train, his view of its near approach being unobstructed had he used his sense of sight. He was a trespasser, pure and simple, using the company's tracks for his own purposes and convenience. His injuries were the result of his own rashness for which the company should not be mulcted in damages.

It is submitted, therefore, that the refusal to instruct the jury to return a verdict and afterwards the further refusal to grant defendant's second prayer for instructions were both erroneous and constitute reversible error.

For like reasons, also, the granting of plaintiff's second prayer for instruction was obnoxious to law and prejudicial to defendant's rights.

II.

The variance between the declaration and the proof with respect to the light on the advancing end of the train was material and, under the law, should have resulted in a nonsuit.

The declaration avers that "there was *no* light upon the rear part of said engine to indicate its approach," and "that by reason of the reckless and grossly careless manner in which the agents of said defendant operated said engine, *in failing to place* ANY *light upon the rear part of said engine*, which was being backed along said Maryland avenue in the direction of the plaintiff, so as to indicate the approach of said engine plaintiff was injured."

It seems certain that these two averments of the declaration were intended to and do assert that the absence of *any* light on the advancing end of the tender was an element of the defendant's alleged negligence which was relied upon

The language used is simple and plain and hardly susceptible of the restricted character with which the Court of Appeals invested it.

The testimony of Faunce and of the defendant's witnesses shows that there was a signal lantern hanging on a hook on the rear or advancing end of the tender. Faunce, plaintiff's witness, testifies he first saw this light on the tender when the engine was coming across the bridge *about 200 feet away*, and also testified that he had never seen any other kind of a light on the rear of the tender of a backing engine nor one that gave a brighter light (17). Phillips, the gate tender at 13½ street, testified that he saw the light on the work-train a half a mile away (28), and Maddox, the fireman, testified that when the train came to a stop he went to the back end of the tender and saw that the lamp was burning (23).

This testimony was uncontradicted. It clearly shows not only that there was a light on the rear of the tender, but that it was burning and of sufficient brilliancy to indicate the approach of the train for a long distance. It was therefore error in the trial court to refuse to give the defendant's fourth and sixth prayers.

III.

Plaintiff's first prayer, which was granted and read to the jury, was improper in form, erroneous in law, and inapplicable to the facts disclosed by the evidence.

The prayer is as follows:

"1. The jury are instructed that if they find that the injuries received by the plaintiff on the evening of the 10th of December, 1894, by being run over by a locomotive on the defendant's railroad track on Maryland avenue, in the city of Washington, were caused by negligence of some

person or persons in the employ of the defendant company, then the plaintiff is entitled to a verdict, unless the jury further find from the evidence that the plaintiff's own negligence contributed to the injury; and in determining whether the injury was caused by the negligence of the defendant's employés or any of them, the jury have a right to take into consideration the FACTS (1) that the railroad tracks at the point where the accident occurred were not protected by a fence, as required by the regulation of the District Commissioners, which is in evidence; (2) whether the light at the front end of the train was substantially such a light as required by the regulation of the District Commissioners, given in evidence, or such a light as was requisite to give proper warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff before it was brought to a stop; and (4) all the evidence in the case tending to show whether or not the persons in charge of the engine drawing the train were keeping a proper lookout, and the jury will consider all the evidence in the case bearing upon these questions."

Plaintiff's declaration contained three charges of negligence against the defendant company, to wit:

1. That the engine was being backed along the track at the place where the plaintiff was injured, and that there was NO LIGHT on the rear of the engine to indicate its approach.

2. That there was no signal of the coming of the said engine given by the said defendant.

3. That there was no gate or fence erected alongside of the tracks at the place where the accident occurred.

The instruction complained of informed the jury that they "have a right" to take into consideration the FACTS (1) that the railroad tracks at the point where the accident occurred were not protected by a fence *as required by the regulation* of the District Commissioners in evidence.

It is to be remarked, in reference to this, that the regulation referred to does not *require* a fence at this place. The regulation is in the following words (18):

"Whenever the grade of a steam railroad track is *approximately even* with the adjacent surface, the line of the road shall be securely closed, on both sides, with a substantial fence."

The testimony shows that the grade of the railroad track where this accident happened was not *approximately even* with the adjacent street, but on the contrary that the track *was two feet two inches higher than the street* (20). The plaintiff, therefore, was obliged to climb up this height in order to get upon the track, and it is submitted that this portion of the instruction constitutes reversible error, inasmuch as it asserts as matter of *fact and law* that the tracks were not fenced, though so required to be by the police regulations of the District.

If the matter of the presence or absence of fences was a proper subject for the consideration of the jury, that body should have been permitted to take into consideration that no particular kind of fence, except that it must be substantial, is specified by the regulation, and the evidence showed that the defendant's tracks at this point were separated from the roadway by substantial curbs sunk into the roadway and projecting eight inches above the same.

The second subdivision of the instruction authorizes the jury to determine whether or not the light at the front end of the tender was substantially such a light as is required by the regulation of the Commissioners given in evidence, or whether it was such a light as was requisite to give *proper warning* of the approach of the train. This was not in conformity with the pleadings. The declaration alleges in more than one place that there was *no light* on the rear end

of the tender, which was at the front of the train. The plaintiff should have been confined to the averments of his declaration, and, having alleged that there was *no light*, he should not have been permitted to prove that the defendant was guilty of negligence, not because it carried *no light*, but because the light it did carry was *insufficient*. Furthermore, the question whether the light carried was a sufficient light or such an one as was necessary to give proper warning of the approach of the train was a question of law and not a question of fact. In any event, before the jury should have been allowed to pass upon the question, it was necessary that there should have been some competent evidence offered upon that subject. The testimony of men experienced in such business might have tended to throw *light* upon the question, but a jury cannot know intuitively whether a particular kind of lamp is sufficient or insufficient for such purpose. If such questions are to be submitted to jurors, one jury might well determine that a given style of lamp is sufficient, and another jury, sitting in the same court on the same day and trying the same state of facts in another cause, might find to the contrary. The futility of submitting such questions to juries and the rule against such course is well illustrated by the following cases:

Delaware R. R. Co. *vs.* Converse, 139 U. S., 469, 473.
R. R. Co. *vs.* Ives, 144 U. S., 427–428.
B. & P. R. R. *vs.* Springman, 5 Mackey, 1.
B. & P. R. R. Co. *vs.* Golway, 6 App. D. C., 143.
Eck. R. R. Co. *vs.* Hunter, 6 App. D. C., 287.
B. & O. R. R. Co. *vs.* Adams, 10 App. D. C., 97.
Dyer *vs.* R. R. Co., 71 N. Y., 228.
Beisegle *vs.* R. R. Co., 40 N. Y., 9.
State *vs.* P., W. & B. R. R. Co., 47 Md., 76, 85.
Haas *vs.* R. R. Co., 47 Mich., 401, 406.

The third subdivision of this remarkable prayer and instruction authorized the jury, on the question of defendant's negligence, to consider "the distance passed over by the train after it struck the plaintiff before it was brought to a stop." It is difficult to see the application of this subdivision to the evidence in the present case. It was applicable and proper upon the evidence in the Ives case (144 U. S., 427), whence plaintiff's attorneys apparently derived it. There an experienced engineer was called to testify as to the probable rate of speed at which the train was moving judging from the distance the train ran after the accident had taken place. In the present case there was no testimony upon the subject from the plaintiff, but defendant's engineer testified that after the accident he thought the train moved about 90 feet. The testimony concurred in establishing the fact that the plaintiff was found at or near the nose of the pilot of the engine, which indicated that the tender of the engine, the engine, and the pilot all passed over the plaintiff, and the distance the train moved after the boy was struck, therefore, was the length of the engine, tender, and pilot taken together. This instruction could have had no less harmful effect upon the jury than to at least produce confusion in their minds and lead them to suppose that it was an important consideration in the case, and this necessarily to the prejudice of the defendant.

The testimony shows that the train was moving upgrade and that it was moving at a rate of speed not more than 12 miles and not less than 8 miles an hour. There is no averment in the declaration that the train was moving at a higher rate of speed than was reasonable and consistent with the regulation and of the safety of the people who might be in the vicinity.

It is evident that when this instruction was drafted counsel for plaintiff had before him the case of The Railway

Company *vs.* Ives, 144 U. S., 427, 428, but it is difficult to understand how any parallel can be drawn between that case and the present. In that case the *crossing* where the accident occurred was in a thickly populated part of a large city. There were various obstructions of the line of vision in both directions, and the proof showed that the train was moving at an extraordinary rate of speed. There were other circumstances indicating negligence on the part of the defendant company. In the case at bar the plaintiff attempted to cross the tracks midway between 13½ and 14th streets, at a place where people were not accustomed to cross, and where it was difficult to cross, because the tracks were greatly elevated above the level of the street. Before the plaintiff could get upon the railroad track it was necessary for him to mount upwards a distance of two feet two inches (20). At the crossing on 13½ street, where people were expected to cross, there was a plain unobstructed and convenient passage for pedestrians, except when trains were about to pass, when the gates were closed, and they were actually closed at the time of this accident. If plaintiff had proceeded to either of the neighboring street crossings for the purpose of crossing the tracks, as he should have done, he would have been met by the closed gates, and would doubtless have thus been spared all injury. The proof shows that the train was moving at the rate of from 8 to 12 miles an hour. One of the defendant's witnesses says that it was moving between 8 and 10 miles an hour. But the engineman and fireman put it at 8 miles an hour. Only one of the witnesses for the plaintiff said anything about the rate of speed, and he said the train was moving at the rate of 12 or 15 miles an hour, this evidently being a mere guess on his part. The maximum rate of speed, fixed by the regulation of the Commissioners of the District for the movement of steam railroad locomotives in the streets of Washington, was at that time, and is now, 12 miles an hour. There

was no *evidence* that the train was moving at a greater rate of speed than 12 miles an hour. In the Ives case the court declares that there was evidence that the ordinary signals of blowing the whistle and ringing the bell at the crossing were not given, and that the train was running at a more rapid rate of speed than was permitted by the city ordinance. There is no evidence in this case that the men on the engine were not ringing the bell. The plaintiff says that he heard neither whistle nor bell; he also testifies that he did not see the train that injured him. But just as the train in fact was in plain view although he did not see it, so the engine bell was rung, though he may not have heard it. The men on the engine and other witnesses for the defendant who were in the vicinity of the accident testified positively that the bell was ringing from the time the train left the bridge to the time of the accident.

Paragraph numbered 4 of this instruction informs the jury that they may consider "all the evidence in the case tending to show whether or not the persons in charge of the engine drawing the train were keeping a *proper lookout*." This is also from the case of The Railway Company *vs.* Ives, 144 U. S., 420. The language of the trial court used in that case is as follows:

"So, if you find that the train hands kept no proper lookout, managed the train without due caution and reasonable care, you will be authorized to infer negligence on the part of the company as one of the facts established in the case."

In referring to the language of the trial court in that case and the claim of counsel, based thereon, that the instruction was erroneous because there was no evidence that the train hands had kept no proper lookout, etc., this court said:

"This contention is also without merit. There was evidence that the ordinary signals of blowing the whistle and ringing the bell at the crossing were not given, and that the

train was running at a more rapid rate than was permitted by the city ordinance. If the jury believed that evidence they must necessarily have found that the trainmen did not keep a proper lookout, and did not manage the train in a prudent and careful manner."

It seems plain that the trial court committed error in the case at bar when the jury were instructed that they might consider whether the persons in charge of the engine drawing the train were keeping a *proper lookout*, for there was no evidence here, as there was in the Ives case, to authorize the court to give the jury any such instruction. The engineer swears that he was at his proper place looking ahead; the fireman also swears that he was at his proper place looking ahead. They both saw the plaintiff, and as soon as they suspected that he might walk upon the track, took such precautions as were necessary and proper under the circumstances. Faunce, the stand-by witness for the plaintiff, says he did not see either the engine-man or the fireman, but there was no evidence competent to go to the jury tending to show that the men on the engine were not keeping "a proper lookout."

The Court of Appeals, in passing upon this instruction, said (18):

"To this instruction exception was taken, on the ground that it was not based upon any sufficient testimony in the case, and that it was, in part at least, inconsistent with the allegations of the declaration. That the instruction is inaptly drawn, is loose in its phraseology and grammatical construction, and is perhaps to some extent misleading, seems to be quite clear; and if it stood alone, there might be grave question whether it would not warrant a reversal of the judgment. It refers to certain suggestions for consideration as being *facts*, when only one of the matters suggested could, with any propriety of language, be so characterized; and even that one seems to assume that the failure of the railroad company to construct a fence at the place of

the accident was an act of negligence *per se*, without reference to the question of its practicability or to the question whether the relation of the tracks at that place to the adjoining surface of the roadway justified the application thereto of the ordinance in regard to fencing. But the instruction does not stand alone; it was given to the jury by the court with an explanation so clear and ample as to leave no doubt of its meaning. The court informed the jury that they were not to understand from the instruction that the mere failure to keep a fence at this point should be regarded as being *per se* an act of negligence; but that it was for the jury to determine, under all the circumstances of the case, whether it was practicable and proper to have a fence at that point. Similarly in regard to the signal light upon the engine, the jury were told that the failure of the company to provide such a light for the engine as was required by the regulation of the Commissioners would not be an act of negligence, if the light that was there was a proper and sufficient one to give warning of the approach of the train. The instruction so construed and explained, was as favorable to the defendant as it could reasonably expect."

So far from relieving the vice of this instruction, it seems to us that the explanatory sentences and phrases of the general charge (*ante*, p. 9) but served to increase the difficulty and intensify its ambiguity. The prayer and the explanatory sentences together might well tend to confuse men of more than average jury intelligence. That it operated to the wrongful prejudice of the defendant can hardly be doubted.

It is the settled doctrine of this court that "while it is a sound principle that no judgment should be reversed on error when the error complained of worked no injury to the party against whom the ruling was made, *it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party.* The case must be such that this court is not called on to decide upon the

preponderance of evidence that the verdict was right, notwithstanding the error complained of."

Smiths *vs.* Shoemaker, 17 Wall., 639.
Deery *vs.* Cray, 5 Wall., 795.
Moores *vs.* Nat. Bank, 104 U. S., 630.
Gilman *vs.* Higby, 110 U. S., 47, 50.
Vicksburg, &c., R. R. *vs.* O'Brien, 119 U. S., 99, 103.

Who can say from an examination of the record in this case that *it appears beyond doubt* that the jury was not influenced to the prejudice of the defendant by this instruction? Can this court say that it *appears perfectly clear* that the jury were not misled by the various manifest errors that were embodied within it?

Upon the whole case, the judgment of the Court of Appeals should be reversed and the cause remanded to that court with instructions to reverse the judgment of the supreme court of the District of Columbia and remand the cause to that court for further proceedings to be had therein in accordance with law and justice.

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OCTOBER TERM, 1899.

No. 87.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

I.

THE COURT BELOW DID NOT ERR IN REFUSING TO HOLD AS A MATTER OF LAW THAT THE PLAINTIFF WAS BOUND TO EXERCISE THE SAME DEGREE OF CARE AND PRUDENCE THAT AN ADULT WOULD HAVE BEEN BOUND TO EXERCISE UNDER LIKE CIRCUMSTANCES.

The plaintiff was born August 26, 1882 (15). The accident occurred December 10, 1894, so that at the time he was a little over twelve years of age. There was abundant

testimony, however, tending to show that he had the capacity only of a child of little more than half his years. His own examination indicated his mental deficiencies. He could not tell correctly the number of the house in which he lived, either at the time of the trial or at the time of the accident (6, 9, 15). He had to be led to enable him to state with any accuracy the time of day when the accident occurred (6, 7). Although perfectly familiar with the locality, he thought that the end of the bridge is towards the north from where he was injured, when in fact it is southwest (7). He stated with great composure that he went to school for four or five years, but did not learn to either read or write (12). He was positive that the electric light at this end of the bridge was not lighted at the time of the accident (13), whereas every other witness in the case testified, and the admitted fact was, that it was lighted. In addition to this, the court and jury below had an opportunity to see and hear the plaintiff testify, and could judge something from his appearance. Two witnesses who had known him well all his life, and another who had been his school teacher for several months just prior to the accident, testified, in substance, that at that time he had the mental capacity of a child of six or seven years of age (Faunce, 16; Corcoran, 17, 18; Mrs. Campbell, 18).

It is quite true, as counsel for the appellant insist, that the boy's father testified that before the accident his son was a bright lad, and that the father attributed the boy's mental weakness to his injuries (15). But it need scarcely be said that upon all the evidence it was for the jury to say what was the plaintiff's mental capacity at the time of the accident.

On this point the only instruction that was given to the jury was the second instruction asked by the plaintiff's counsel (31). That instruction left it to the jury to say, upon the whole evidence, whether the plaintiff had exercised the degree of care which might reasonably be expected

of one of his age and capacity. It was taken almost *verbatim* from the opinion of this court in Railroad Co. *vs.* Gladmon, 15 Wall., 401–408. It is substantially what this court subsequently held to be the law in Railroad Co. *vs.* Stout, 17 Wall., 660. Railroad Co. *vs.* Gladmon was followed by the Court of Appeals of the District in Met. R. R. Co. *vs.* Falvey, 5 App. Cas. D. C., 176, and in Reiners *vs.* W. & G. R. Co., 9 App. Cas. D. C., 19.

The precise question which is involved here—whether it was for the court or the jury to say what was the mental capacity of the plaintiff and what the corresponding degree of care required of him—was submitted to the Court of Appeals and decided against the appellant's contention in B. & P. R. Co. *vs.* Webster, 6 App. Cas. D. C., 182.

In view of the repeated adjudications of the question by this court, it seems to be unnecessary to review the cases in the State courts. It will be found, however, upon an examination of the cases which are cited on pages 5 and 6 of the appellant's brief, that such of them as bear upon the question at all are against the proposition in favor of which they are cited. For instance, in the case of Nagle *vs.* R. Co., 88 Pa. St., 35, it was said that the degree of care which is to be exercised by a child under fourteen years of age is a matter for the determination of the jury in the particular case. In the passage which is quoted in the appellant's brief, the court simply held that when the child is over fourteen and there is no evidence as to its having less than the usual mental ability, it is presumed to be chargeable with the same degree of care as an adult; but the court also expressly says that where the child is over fourteen and there is evidence upon the subject, even then the question is one for the jury.

McMahon *vs.* R. Co., 39 Md., 451, 452, another of appellant's cases, is a strong authority against it.

Two recent and weighty cases to the same effect in other jurisdictions are Crane Elevator Co. *vs.* Lippert, 24 U. S. App., 186, which related to a child over fifteen years of age,

and Plumley *vs.* Birge, 124 Mass., 57, in which the infant concerned was thirteen years old.

II.

THE COURT DID NOT ERR IN OVERRULING THE MOTION MADE BY DEFENDANT'S COUNSEL TO DIRECT THE JURY TO RENDER A VERDICT FOR THE DEFENDANT.

This accident occurred about a quarter past five, on the evening of December 10, 1894 (6, 7, 15). "It was dark, rainy, foggy, and very cold" (Charles J. Cumberland, 15). "It was a dark, rainy, misty evening" (Motley, 16). "It was drizzly, misty weather, and it was getting dark" (Faunce, 17). It was so dark that, although the engineer and fireman on the locomotive that struck the boy had their eyes on him up to the time he stepped on the track right in front of the locomotive, they could not tell whether the moving object was a man, woman, boy, or girl, and could not see whether the object carried a ladder. (Bush, 21, 22; Maddox, 23, 24.)

The plaintiff testified that when he approached the track he looked both ways to see if the train was coming, and kept looking until he got almost on the track (7, 9, 10). A train was passing, or had just passed, on the north track, going south toward the bridge, the rear end of that train passing the place where the boy was just about the time the locomotive of the train that struck him reached him (25, 26, 27). The bell of the engine hauling this south-bound train was ringing (26, 27). Two men at the switch between the boy and the bridge were shouting (24, 26). The engineer and fireman of the locomotive that struck the plaintiff joined in the shouting (21, 23). A number of vehicles that had just come over the bridge from the races on the Virginia side were rattling and rumbling over the cobble-stone pavement, and made such a noise that the shouting

could not be heard (27, 30). Even the telegraph operator, Beall, who was in his box, within a few feet of where the accident occurred, did not hear any of the shouting nor notice anything unusual until he heard the engineer of the construction train putting on his brakes (30). The engine of the construction train was in front of the train, but was itself backing. Its headlight was lighted, but was throwing its rays not to the front, but on the cars behind the locomotive (24). At the same end of the engine, and near this headlight, were two other lamps, which were also throwing their rays in the wrong direction (29). Standing where the boy was and looking toward the train, one looks directly at the brilliant electric light at the east or north end of the bridge, which was 400 feet distant and on a pole eighty feet in height (25, 26). The switchman Roby, who was standing by the switch-box, had a hand lamp in his hand (26). There were a number of other switch-lamps on the track near the switch-house, and there was a hand lamp with a dull light on the front end of the train, which was the back end of the locomotive (17). The map which was introduced in evidence by the defendant showed that the distance from the switch to 13½ street was 316½ feet. Roby, who was standing at the switch, testified that when the boy was struck he was about 70 feet from where he was standing (24). When the train was stopped the front of the train had reached the west line of 13½ street (22). Hence, if Roby was to be believed, the train had gone a distance of 246½ feet after it struck the boy. Roby was confirmed as to all his testimony by another witness for the defendant, one John R. Thomas (26), who had been conveniently employed by the defendant company about four months before the trial (27). The engineer who was in charge of the locomotive admitted that such a train, going at the rate of eight miles an hour, could have been stopped in 90 or 100 feet after the brakes were put on. After the train stopped the engineer asked the gateman if the train had struck anything (22, 28).

The regulations duly adopted by the Commissioners of the District of Columbia prior to the accident, and which were in force at the time, required that the defendant's road at the point where the accident occurred should be securely enclosed on both sides with a substantial fence. There was no fence there on either side, although one was subsequently placed on the north side (18). These regulations also required that between sunset and sunrise of each day "a headlight or other equivalent reflecting lantern" should be displayed upon the advancing end of every train of steam railroad cars (18). It was also provided that trains should not go in the city at a greater rate of speed than 12 miles an hour (18, 19). One of the witnesses testified that the train was going from 12 to 15 miles an hour (17).

Albert P. Motley, a witness for the plaintiff, testified that he was standing at the southeast corner of Thirteen-and-a-half street and Maryland avenue when this accident occurred; that he saw the plaintiff going from the lamp on the south side of Maryland avenue towards the railroad track, and that at that time he saw no train coming towards plaintiff. He said, further, that he saw the passenger train bound south pass, and this latter train was about opposite the boy when he saw him coming towards the track (16). From the map, which is a part of the record, it will be seen that this witness was looking directly towards the train which struck the plaintiff, and the fact that he did not see the train or any lights which indicated to him that a train was coming was cogent evidence on the question whether the plaintiff could have seen it when he looked in the same direction at the same time.

On these facts, it is respectfully submitted that the case is governed by Grand Trunk R. R. Co. *vs.* Ives, 144 U. S., 429, and Tex. & Pac. R. R. Co. *vs.* Gentry, 163 U. S., 353.

In Grand Trunk R. R. Co. *vs.* Ives, a man in a buggy in broad daylight drove in front of an approaching train at a railroad crossing and was killed. While still some distance

from the tracks he had stopped and listened, and while he was there a train on a parallel track passed by. Soon after it had passed and while the noise caused by it was still distinct, the deceased drove on. Just as he reached the track, and while apparently watching the train that had passed, he was struck by a train on one of the tracks of the defendant. In that case this court held that the trial court properly instructed the jury, among other things, that they should scrutinize the actions and doings of the deceased "under the light of the then situation; the nature and character of the crossing; the fact of the difficulty of observation; the time of day and the probability of danger from passing trains; the fact that there were other railroads side by side; that another train on one of these was actually approaching and passing; the noise and confusion; possibly the noise and confusion of signals, and every fact and circumstance bearing on the case to influence his conduct then and there under those circumstances, and not any other circumstances."

In Texas & Pacific R. R. Co. *vs.* Gentry (163 U. S., 353) it appeared that a railroad engineer in crossing in the nighttime tracks in a railroad yard, with which he was familiar, to go to his work was run over and killed by a switch-engine. This engine had a headlight, but there was a flat car in front of it, which was an unusual arrangement. It was held by this court that, as no one saw the accident, it was for the jury to say whether the deceased stopped, looked, and listened, the presumption being that he did; that it was a question for the jury whether the deceased was so blinded by the headlight that he could not see the flat car, and that it was a case for the application of the rule that where reasonable men may differ as to whether the party injured was guilty of negligence that question should be submitted to the jury.

On this point see also Railroad Co. *vs.* Carrington, 3 App. Cas. D. C., 112, 113; and B. & P. R. R. Co. *vs.* Webster, 6 App. Cas. D. C., 182, 197, 198.

III.

THE PLAINTIFF'S FIRST PRAYER WAS PROPERLY GRANTED.

As to the construction of the regulation requiring tracks to be fenced in when the grade is "approximately even with the adjacent surface," it seems reasonably clear that the intention was to require a fence where people would be likely, in the absence of it, to walk across the track. The testimony of the civil engineer, Brown, on behalf of the defendant was that at Thirteenth-and-a-half street the tracks and the curb are both flush with the street; *that half way down the square* the tracks are a foot and a half above the curb. He also said that the curb is four or five feet from the rails, and he says, apparently as a conclusion, that all this makes the tracks two feet and two inches above the roadway (20). This means that there was one step of a foot and a half from the tracks down to the adjoining pavement, and that four or five feet further on there was another step eight inches from the curb down to the roadway in the middle of the square. But this witness further testified that the place where the accident occurred was much less than half way down the square (see map); and Phillips, the gate-keeper at Thirteen-and-a-half street, testified that when the boy was struck he was only 90 feet from Thirteen-and-a-half street and 200 feet from Fourteenth street; so that, according to the testimony of this witness, he crossed the track at a point where it was nearly flush with the street.

Some criticism was made upon this part of the prayer in question because, it is said, it assumes as a fact that the regulation of the District Commissioners required a fence to be erected at the place where the accident occurred. There are two replies to this criticism. In the first place, upon the undisputed evidence in the case the track was "approximately even with the adjacent surface" within the meaning

of that phrase in the regulation of the District Commissioners (18). There was no evidence that on the south side, where the boy approached the tracks, there was any elevation of the track above the roadway. The defendant's engineer, Brown, who is the only witness upon this subject, produced a map, a copy of which is in the record, showing a curb line just north of the tracks extending from a point a short distance west of the curb line of Thirteen-and-a-half street to the "Fourteenth Street tower." But on the south side, near the point where the boy approached the tracks, there appears to be no curb except the usual curb between the sidewalk and the roadway proper. Brown testified, when "recalled and further examined," that the curb is about four or five feet away from the rails on each side of the main track. It is evident from an inspection of the map that, so far as the south side of the street is concerned, the curb to which he referred extended but a short distance west of Thirteen-and-a-half street and terminated not less than sixty feet from the place where the accident occurred.

It further appeared from the testimony of this engineer that after the accident occurred a fence was constructed by the railroad company on the north side of the track all the way from Thirteen and-a-half street to Fourteenth street, and that this fence was put up directly outside of the curb line (19, 20).

It is quite apparent that before the erection of the fence on the north side of the track there was nothing to deter persons from crossing the street at the point in question. Indeed, Roby, one of the witnesses for the defendant, testified that this boy had been engaged in lighting lamps down in that locality for about a year, "and was in the habit of crossing the tracks at that point" (24). From all this it is submitted that, as matter of law, the proper construction of the regulation in question required the erection of a fence on the north side of the track between Thirteen-and-a-half and Fourteenth streets. If a fence had been put on the

north side it would, of course, have prevented persons from crossing, and this accident never would have happened. As to the south side of the track, the excuse offered for not having a fence there was that it was impracticable because of the switch connecting the tracks running into the Richmond and Danville yard with the main tracks on Maryland avenue. It is obvious that this could not justify the railroad company in failing to have a fence anywhere on the south side of the square. It could at the most authorize only leaving a break in the fence of such width as would permit the proper use of the switch.

But in fact the court did leave it to the jury to decide whether or not the place was one at which a fence was required on either side of the track by the regulation in question. In the general charge to the jury the court, after reading the prayer under discussion, said:

"You will see, gentlemen, that that instruction recites four distinct suggestions, which you may consider in determining whether the defendant was guilty of negligence. The first one relates to the question of the fence. It is admitted that there was no fence here at this point. The regulation of the District Commissioners, which is in evidence before you, requires generally that there shall be a fence. The court does not undertake to instruct you, and you are not to so understand the instruction, that because there was no fence there you are therefore to find that the railroad company was guilty of negligence. The court does not so instruct you, but submits to your judgment whether the fact of the fence shall be considered negligence in this case. That is a question of fact; but in determining whether the absence of the fence is negligence, you are to consider that the Commissioners required it, and that they had the right to require it, and that it was not there. You have also the right to and should consider the evidence that has been given tending to show that it was impracticable to put a fence there, and you are to consider whether, under all the facts and circumstances of this case, considering the situation, the fact of not having a fence there shall be considered negligence on the part of the railroad company. If you

think it was impractical to build a fence there, and that they could not manage the road reasonably with a fence there, then it would not be negligence in not having it there, although the District Commissioners' regulations required it. The proper construction of that regulation is that the fence should be placed at all points where it was practicable to put it and not interfere with the operation of the road; and you will consider that regulation and the facts of this case in the light of that instruction I have given you. It is for you to say whether the absence of the fence is negligence under the circumstances of this case" (34, 35).

It is further objected to the plaintiff's first prayer that it was error to leave to the jury the question whether the hand lamp, which the evidence tended to show was on the tender, was substantially such a light as required by the regulations of the District Commissioners, or such a light as was requisite to give proper warning of the approach of the train. Counsel contend that this was a question of law for the court. A number of cases, two of them in this court, are cited by counsel for the railroad company in support of this proposition. We have examined all those cases and find that such of them as refer to the matter at all are directly against the proposition laid down by opposing counsel.

The evidence in the case as to this lamp was as follows: Faunce, a witness for the plaintiff, who was standing at the east end of the Long bridge when this train passed him, said that "there was not a regular headlight on the rear of the tender, which was then the forward end of the engine, but that there was a small white hand lamp hanging thereon, such as brakemen carry for signaling, and this was lighted and shining, but it was not a very bright light" (17). Bush, the engineer of the train which struck the plaintiff, and who was called as a witness for the defendant, testified that he saw the plaintiff just before he was struck; "that witness did not know whether it was a boy or girl or man or woman; that he knew it was a person of some kind; that the light they had in front did not throw an illumination

on the object so that he could tell whether it was a man or child" (22). Maddox, the fireman on this locomotive, and another of defendant's witnesses, testified "that the lamp on the tender would not shine in the direction from which the person was approaching the track; that it did not give a light in every direction; that it was swinging on a hook; that it would give a light straight in front and would not to the side" (24). Roby, another of defendant's witnesses, testified simply "that there was a hand lamp swinging on the advancing end of the tender" (25). Phillips, who for the defendant attended to the gate at Thirteen-and-a-half street, testified on behalf of the defendant "that the tender of the engine had a light on it like those used for signals; that it gave a tolerably fair light" (28).

It is respectfully submitted that upon this evidence the court might well have instructed the jury as matter of law that this hand lamp was insufficient to comply with the requirements of the regulation established by the District Commissioners that "between sunset and sunrise of each day a headlight or other equivalent reflecting lantern * * * shall be displayed upon the advancing end of every train" (18). It seems equally clear, without reference to the regulation, that the court might very properly have told the jury that ordinary care would have required that the railroad company should not back an engine along the streets of a city on such a night as the one in question without having any other light on the front of the train than a hand lamp such as switchmen and other trainmen habitually carry. A person seeing such a light coming up the track would not only not be warned by it, but would be misled by it. He would no more think that it indicated an approaching train than he would from seeing a similar lamp swinging in the hand of a switchman a few feet further away; but as to this part of the instruction, as well as to that part of it which related to the matter of the fence, the court carefully left the whole question to the jury, the part

of the charge bearing upon the matter of the sufficiency of the light being as follows:

"The next point that is submitted to your consideration on the question of negligence of the defendant is whether the light at the front end of the train was substantially such a light as was required by the regulations of the District Commissioners, given in evidence, or such a light as was requisite to give proper warning of the approach of the train. The regulation of the District Commissioners required a light of a particular character. It is not absolutely necessary that the light should be exactly like the light that the District Commissioners require. If it was substantially like it that would be a compliance with the regulations. And even if it was not substantially like it, yet, if you believe from the evidence that the light was a proper and sufficient one to give warning of the approaching train, it would not be negligence simply because it did not correspond with the kind of light that the Commissioners required, the object of that regulation of the Commissioners being that railroad companies should have a light that would be sufficient in kind and character to give warning of an approaching train. And if you find that the railroad company had such a light as that it would not be guilty of negligence, but if it had a light that was insufficient to give warning of the approaching train, then it would be negligence, and that is submitted for your consideration" (35).

As to whether there was any evidence in the case tending to show that the persons in charge of the engine drawing the train were not keeping a proper lookout, it is sufficient to say that the engineer himself testified that at the time of the accident his train was moving at the rate of about eight or ten miles an hour (21); that when moving at that rate it could be brought to a stop in about 90 or 100 feet (22); that the same witness testifies that when he stopped his engine after the accident the front end of the engine "was right flush with the west curb of Thirteen-and-a-half street, right where the gate begins" (22); that the defendant's switchman, Roby, testified for it that he was standing in front of the switch-house "and about 70 feet

from where the boy was struck" (24); and that according to the map which the defendant itself put in evidence the distance from the switch-house to Thirteen-and-a-half street was not less than 280 feet. Even if we take as the place where the boy was struck the place marked "Point of accident" on the map in question, we find, noting that the map is upon the scale of one inch to 20 feet, that the distance from that point to the gate is 129 feet. In addition to this it must be remembered that after the train stopped the engineer asked the gatekeeper whether he had struck anything, plainly indicating that neither he nor his fireman had seen the boy at all.

Finally, a fatal objection to all the points made as to the sufficiency of the prayer in question is that the objection was too general. The record shows that when the plaintiff's counsel presented this prayer and another, the defendant, by its counsel, objected to each of them; that the court overruled the objection and the defendant excepted. No specific defect in the prayer was pointed out. (See B. & P. R. Co. *vs.* Mackey, 157 U. S., 86; Bogk *vs.* Gassert, 149 U. S., 26, and cases there cited in the opinion.) It is not disputed that the first proposition contained in the prayer is unobjectionable. It simply informs the jury that if the plaintiff was injured by the negligence of the defendant or its agents he would be entitled to a verdict, unless the jury found from the evidence that his own negligence contributed to the injury.

AS TO THE ALLEGED VARIANCE BETWEEN THE PROOF AND THE DECLARATION.

One of the charges of negligence against the defendant contained in the declaration is "there was no light upon the rear part of said engine to indicate its approach," and that the defendant was negligent "in failing to place any light upon the rear part of said engine, which was being

backed along said Maryland avenue in the direction of the plaintiff, so as to indicate the approach of said engine." It appeared from the evidence of Faunce, one of the plaintiff's witnesses, and from the testimony of several of the defendant's witnesses, that there was upon that part of the locomotive which was in front as it backed into the city the hand lamp, the testimony in regard to which has been quoted on pages 11 and 12 of this brief. And the claim of the defendant's counsel here seems to be that the declaration alleged that there was no light, while the proof showed that there was a light, and that the plaintiff cannot recover upon the ground that it was an insufficient light.

It is to be observed that no objection was made to the evidence submitted by the plaintiff on this point. The proper time to object to such variance is when proof is offered of a different state of facts from that set out in the declaration. Nor was the point made when the plaintiff's testimony was closed or at the close of all the evidence. There was no motion to strike out the evidence as to the light. The point arises upon the refusal of the court to grant the defendant's sixth prayer (32), to the effect that if a lighted lantern was suspended on the end of the engine which was being backed into the city, then it is immaterial whether such lantern fulfilled the requirements of the police regulations on that subject.

As no objection had been made to the evidence as to the light that was on the engine and no motion had been made to strike it out, it is not competent for the defendant to raise the question of variance by a prayer of this kind.

The prayer was defective also because it relates only to the matter of the police regulation, whereas, without any reference to that regulation, it was a question for the jury whether or not the light was not insufficient for the purpose of giving warning to persons on or near the track of the approach of the train. All this becomes immaterial, however, for the reason that, as held by the trial court and

by the Court of Appeals, the reasonable meaning of the reference in the declaration to the light on the engine is, not that there was no light at all, but that there was no such light as would indicate its approach, and whether that light was sufficient, either under the police regulation or on general principles, the court carefully left to the jury to determine. and in Grayson v. Lynch, 163 U.S. 476

In the case of Nash *vs.* Towne, 5 Wall., 689, 700, an objection as to the variance between the proof and the pleadings was overruled upon the ground that, among other things, the differences, if any, "were not of a character which could have misled the defendants at the trial."

To the same effect are Railroad Co. *vs.* Hunter, 6 App. Cas. D. C., 288, 308, and Willey *vs.* Boston Electric Light Co., 168 Mass., 40.

In this case it is apparent that the defendant company and its agents in charge of the train could not have been misled as to the character of the light on the train by the averments of the declaration, because they had charge of those lights and because those agents were the persons who placed the light in question upon the tender.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 87.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The principal brief for the defendant in error was printed when it appeared that this case was about to be reached for argument and before the counsel for the defendant in error had received the brief of the plaintiff in error. He had been furnished with proof sheets of a proposed brief for the plaintiff in error, but since his own brief was printed he has received that of the plaintiff in error and finds that some of the points contained in the proofs which were mainly relied upon in the court below have been abandoned

here, so that in his brief he appears to reply to arguments that are not relied upon now at all.

In addition to this, counsel for the plaintiff in error have here for the first time undertaken to make an objection to the case of the plaintiff below which was not made or suggested either in the trial court or at the hearing of the case in the Court of Appeals of the District. It is for the purpose of replying to this recently discovered objection that this supplemental brief is prepared.

An examination of the charge of the court to the jury, found on pages 33 to 38 of the record, and of the opinion of the Court of Appeals, beginning at page 43, will show that the objection referred to was not even made orally. In the brief which was used on behalf of the plaintiff in error in the Court of Appeals, one of the assignments of error was that the trial court erred in overruling the motion made by the defendant that upon the whole evidence the jury be directed to return a verdict for the defendant; but in the argument supporting this assignment the only proposition that was urged was that the evidence showed that the injured lad was guilty of contributory negligence.

This court has frequently decided that objections not going to the jurisdiction of the court below cannot be raised for the first time here. This is especially so when the case comes from an intermediate appellate tribunal.

In Montana Railway Company *vs.* Warren, 137 U. S., 348–351, Mr. Justice Brewer, delivering the opinion of this court, said:

"Error is alleged in the judgment of the supreme court of the Territory; and if, in all matters presented to it, its rulings were correct, it cannot be affirmed that its judgment was erroneous, because there were in the record matters not vital to the question of jurisdiction or the foundation of right, but simply of procedure, to which its attention was

not called, and in respect to which its judgment was not invoked. All such matters must be considered as waived by the complaining party. It would be an anomaly if a party feeling himself aggrieved by the rulings of a trial court could appeal to the supreme court of his Territory, and invoke its judgment on certain alleged errors; and, when defeated there, could transfer the judgment of that territorial supreme court to this, and ask a reversal here of its judgments on grounds involving mere matters of procedure in the prior trial, to which its attention was not directed. It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them."

In Carr *vs.* Fife, 156 U. S., 494, 496, Mr. Justice Shiras, delivering the opinion of this court, said:

"The ninth specification of error complains of the refusal of the court below to remand the cause to the superior court of Pierce county upon the showing that, after the admission of the State of Washington, it had been stipulated by the counsel of the respective parties that said cause might be tried in said superior court. But the record shows that the reasons assigned in the court below for the motion to remand did not mention such a stipulation, and it is out of time and place to urge it in this court."

And in Boston & Albany R. R. Co. *vs.* O'Reilly, 158 U. S., 334, 335, Mr. Justice Shiras, delivering the opinion of this court, said:

"The first objection urged to the admission of this evidence is, that it went to show special damage caused to the plaintiff by the loss and interruption of his business, whereas there were no allegations of such special damage contained in the declaration. It does not appear, however, that objection was specifically made to the evidence on the ground that the declaration contained no allegations of the specia

damage sought to be shown; and it is perfectly well settled in this court that where a case has gone to a hearing, testimony been admitted to a jury under objection, but without stating any reasons for the objection, and a verdict rendered, with judgment on the verdict, the losing party cannot, in the appellate court, state, for the first time, a reason for that objection which would make it good (Roberts *vs.* Graham, 6 Wall., 578; Patrick *vs.* Graham, 132 U. S., 627)."

Other recent cases, holding under a variety of circumstances that objections not made in the courts below are waived, are—

Haws *vs.* Victoria Copper Mining Co., 160 U. S., 314;
Martin's Admr. *vs.* B. & O. R. Co., 151 U. S., 673, 687;
Lloyd *vs.* Preston, 146 U. S., 630–645;
San Pedro, &c., Co. *vs.* U. S., 146 U. S., 136, and
Topliff *vs.* Topliff, 145 U. S., 156–173.

The new point upon which, judging from their brief, counsel for the plaintiff in error seem principally to rely in this court, but which was not made or suggested in any form in either of the courts below, is that the lad who lost his arm in the accident which is the subject-matter of the suit was a trespasser upon the railroad company's tracks; and, further, that, being a trespasser, the railroad company was under no obligation to him at the time and place when he was injured, to use due care or any care in running its train; that it could only be liable if after its servants had discovered him on the track they failed to use reasonable efforts to stop the train before it struck him, and that there was no evidence tending to show that such efforts were not made.

For the purposes of their argument, counsel for plaintiff in error in their brief assume that it is undisputed that the defendant in error "attempted to cross the tracks *midway* between Thirteen-and-a-half and Fourteenth streets, at a place where people were not accustomed to cross, and where

it was difficult to cross because the tracks were greatly elevated above the level of the street." But, in the first place, there was great uncertainty as to just at what point between Thirteen-and-a-half and Fourteenth streets the lad was struck by the train. Bush, the engineer, testified for the plaintiff in error, "that the accident happened about sixty feet west of Thirteen-and-a-half street" (21). He also testified that the train ran only eighty or ninety feet after he reversed his engine, and that when it stopped the front end of the engine "was right flush with the west curb of Thirteen-and-a-half street" (22).

Maddox, the fireman, testified for the railroad company that the engineer stopped the train as quickly as he could after they saw the defendant in error step on the track, and that after the engine was reversed "it moved about the length of an engine, which is between 55 and 60 feet" (23). The conductor of the train, Devears, another of the witnesses on behalf of the plaintiff in error, testified that after he felt the jar of the air brakes the train "appeared to him to have gone about sixty feet" (24).

The counsel for the plaintiff in error assume these statements to be true, and say, on page 9 of their brief, "The distance the train moved after the boy was struck, therefore, was the length of the engine, tender, and pilot taken together." Yet, when they discuss the law of the case, they take it for granted that the accident happened midway between Thirteen-and-a-half and Fourteenth streets, which would be about a hundred feet further west.

There is evidence in the case tending to show that the accident did occur about midway between Thirteen-and-a-half and Fourteenth streets. And according to the testimony of Robey and Thomas, both witnesses for the plaintiff in error, when the boy was struck he was only 65 or 70 feet from where they were standing, near the "switchman's box." An examination of the map will show that these two men were opposite Fourteenth street, and that they were

over 300 feet from Thirteen-and-a-half street; so that, according to their testimony, when the lad was struck by the train he was nearly 250 feet from Thirteen-and-a-half street.

Opposing counsel are endeavoring to show that the railroad tracks where the accident occurred are elevated above the grade of the street. On page 8 of the principal brief for the defendant in error it is shown that there is no evidence to justify this conclusion; and now it is seen that to obtain any foundation whatever for this argument counsel are obliged to discard two-thirds of the evidence as to the place where the train struck the boy, and that a large part of the evidence to which they so shut their eyes they, in another part of their brief, assume to be true.

The only evidence in the case as to the elevation of the tracks above the surface of the street was that of the plaintiff in error's witness Brown, and he testified that the tracks and curb were both flush with the street at Thirteen-and-a-half street (20). He does not fix the elevation of the tracks at any point except "half way down the square," and his testimony and the map together show that on the *north* side of the street, midway of the block, there was one step up eight inches to the curb and another of one foot and a half to the level of the tracks (20). On the south side, except for a short distance near Thirteen and-a-half street, there is no curb, except the usual curb between the sidewalk and the roadway, and no elevation of the tracks above the roadway. The map in evidence shows that the whole south side of Maryland avenue outside of the sidewalk, from Thirteen-and-a-half street to Fourteenth street, is occupied by the main tracks and the switches. It is idle, therefore, to argue that there are "elevated tracks" in the middle of the avenue and a roadway on each side from which the plaintiff in error had to mount to the tracks.

Neither are opposing counsel justified by anything in the evidence in saying that the place in question was one "where people were not accustomed to cross." The only

evidence on that subject is that the defendant in error was in the habit of crossing the tracks at that point (Robey, 24).

We submit that on this point this case is not to be distinguished from Railroad Company *vs.* Gladmon, 15 Wall., 401, and Railroad Company *vs.* Stout, 17 Wall., 660. In the former case, a boy seven years old, while attempting to run across the track of the defendant company in front of an approaching car, was run down by the car or the car horses. In Railroad Company *vs.* Stout, a boy six years of age was injured while playing with other children with a railroad "turn-table."

But even in the State courts the position taken by opposing counsel is wholly unsupported.

The cases cited by them on this point, so far as they apply to the facts of the case at bar, are against their contention. For instance, they quote from three Alabama cases. In one of these—Glass *vs.* Memphis & Charleston R. Co., 94 Ala., 587—the court say:

"It is not negligence in itself for one to *cross over* a railroad track wherever he may have occasion to do so. Before making the attempt, however, he must know that no train, engine or car is approaching in such proximity as to render the undertaking dangerous. If he fail to use his senses to this end—if, ordinarily, he omit to stop and look and listen for trains before going upon the track for the purpose of passing over it—his act in so doing is a negligent one *per se;* and if injury result to one thus on the track in consequence of not having taken this precaution, enjoined upon him by the commonest dictate of prudence and care, it is well settled in our jurisprudence that he cannot recover for the mere negligence of the railway company (*L. & N. R. R. Co. vs. Webb*, 90 Ala., 185; *Leak vs. Ga. Pac. Railway Co., ib.*, 161). And it follows, of course, that one having this right, with this care and caution, to cross the track of a railway whenever and wherever he has occasion to be on the other side of it, who takes this precaution, goes on the track for the purpose of crossing it with all the assurance his senses, properly exercised, can give him that it is safe to do

so, and yet from some cause against which he could not guard is injured, he may recover; for the law does not contemplate that railroads, road-beds, and tracks shall impede travelers, whether along highways or across country, any more than their physical conformation may of necessity involve, and while the traveler may be negligent in attempting to cross without proper circumspection, he is never a trespasser, because he is never without this qualified right to cross over."

In Montgomery's Executors *vs.* R. R. Co., 97 Ala., 308, another case relied upon by plaintiff in error, the same court say:

"It was open to inference by the jury on this evidence that deceased was in the act of *crossing* the track and was not getting on it for the purpose of proceeding along its course, when he fell; and if so, he was not a trespasser (*Glass vs. Memphis & Charleston R. R. Co., supra*). But though he was not a trespasser, he might well have been guilty of such contributory negligence in attempting to cross the track in front of the moving tender, if it was moving, or so near to it, conceding it to have been stationary, as that there was danger of its being put in motion and striking him before he could effect the crossing, as would be a complete defense to the action. And whether he was guilty of negligence, thus proximately contributing to the result complained of was manifestly a question for the jury and was properly submitted to their determination in the charges given."

(As opposing counsel have cited these cases from Alabama, it may not be amiss to refer to Railroad Co. *vs.* Shearer, 58 Ala., 672, and Railroad Co. *vs.* Donovan, 84 Ala., 141–147. In the first of these cases it was held that where a train of cars was moving backwards within the limits of an incorporated town while the deceased was walking on the track in the same direction as the moving train and no person was stationed to keep a lookout, and the cars ran over and killed the deceased, that the company was guilty of negligence and that the administratrix was entitled to

recover. In the second case it was held that it is negligence in a railroad company to run a train of cars in a town at a greater speed than the city ordinances allow, and that if injury result, even to trespassers, the railroad company is liable. In that case a child under ten years of age was injured while crossing the tracks at a place where he was accustomed to cross in carrying his father's dinner to him and returning home.)

Another of the cases principally relied upon by counsel for the plaintiff in error is Nicholson *vs.* Erie Railway Co., 41 New York, 533. In that case the court say:

"*If the point where the intestate was killed had been a public highway*, or if at the time he had been a passenger in a car upon the main track, and he had been injured by collision with the cars coming down the branch track, or if in any other way he had been not only lawfully, but in the exercise of a right at that point, the defendant would have owed him a duty to see that the cars upon the branch track were properly secured."

In the case of Johnson *vs.* B. & M. R. R. Co., 125 Mass., 75, cited by opposing counsel, the plaintiff was injured while crossing the defendant's tracks between two stations. There is nothing, either in the statement of the case, the briefs of counsel, or the opinion of the court, to suggest that the place of crossing was on a highway or a place that was at all used by the public.

In Mason *vs.* Mo. Pacific R. R. Co., 27 Kan., 83, from the opinion in which case counsel for the plaintiff in error quote on page 14 of their brief, Chief Justice Horton, who delivered the opinion of the court, expressly says:

"It cannot be well said that such trestle-work and bridge as constructed were either in law or in fact a public street."

The case in 5 Kansas, 98 (U. P. R. Co. *vs.* Rollins), cited in the same connection, grew out of the killing of some

cattle which were grazing on the prairie and had strayed upon the defendant's tracks.

In the next case cited in the brief of opposing counsel, Baltimore, etc., R. Co. *vs.* Depew, 40 Ohio St., 121, the plaintiff stepped on the railroad track just in front of a standing train and walked *along the track* in the direction in which the train was headed. The train started, came up behind him, and injured him. The court did not hold that he was a trespasser, but that he was guilty of contributory negligence in not looking out for the train; and even under those circumstances the court declined to say that the trial judge should have taken the case from the jury.

After referring to the foregoing cases counsel for plaintiff in error say: "To like effect are the following cases," and give a list of thirty-three cases. If the cases in this list are to the same effect as those above mentioned, their only application to this case would be to show that since the boy who was injured was *crossing* a railroad track on a *highway* he was not a trespasser, and the railroad company could not on that account escape, if while using reasonable care under all the circumstances he was run down by a locomotive backing into the city without a headlight.

We have examined the cases in this list, however, and find that in nearly all of them the injured person was *walking along the track*, and was struck by a train approaching him from behind. This was so in R. R. Co. *vs.* Goldsmith, 47 Ind., 43; McClaren *vs.* R. Co., 83 Ind., 319; Palmer *vs.* R. R. Co., 112 Ind., 250; Tenenbrock *vs.* R. Co., 59 Cal., 269; Toomey *vs.* R. R. Co., 86 Cal., 374; Ill. Central R. R. Co. *vs.* Godfrey, 71 Ill., 500; Ill. Central R. R. Co. *vs.* Hetherington, 83 Ill., 510; R. R. Co. *vs.* Zoffinger, 10 Ill. App., 252; Barker *vs.* R. R. Co., 98 Mo., 50; B. & O. R. Co. *vs.* Allison, 62 Md., 479; Candelaria *vs.* R. Co., 27 Pac. Rep., 497, and Spicer *vs.* C. & O. R. Co., 34 W. Va., 514.

In the case of Moore *vs.* Pa. R. R. Co., 99 Pa. St., 301, which seems to be much relied upon by adverse counsel, a boy ten

years old who was walking along the track in a town, on the ends of the ties or sleepers, was run down and killed by a train which came up behind him, which was running at a very rapid rate of speed and which gave no warning by whistle or other signal. In most jurisdictions, upon this state of facts, the question of the defendant's negligence would have had to be submitted to the jury. The rule in Pennsylvania is stricter, perhaps, against supposed trespassers than in any other State, and the court held that there should have been a verdict for the defendant. Yet even in this case the court say of the deceased:

"He was not on the track at a public crossing, nor was he in the act of crossing. *It is true that the railroad track at this place was laid upon the bed of a public street and hence the right to cross it was not limited to the highway or street crossing.* But the boy was walking along the track and not across it when he was struck."

Of the seven judges who sat in this case two, Trunkey and Sterett, JJ., dissented.

As to the other cases on the list, in Dull *vs.* R. Co., 52 N. E. Rep., 1013 (Indiana), the child who was injured was *standing* on a railroad track; in Messer *vs.* R. Co., 68 Ia., 602, the boy who was injured was playing on a railroad track; in Wright *vs.* B. & M. R. Co., 129 Mass., 440, the injured person was crossing the railroad tracks from one station to another at a place where the tracks were not in any highway; in Morrisey *vs.* Eastern R. Co., 126 Mass., 377, the boy who was injured was playing on the track, and that, too, in a place which was not in any highway; in Mugford *vs.* B. & M. R. Co., 52 N. E. Rep., 1078, a boy who was stealing a ride on a freight car was ordered by the brakeman to jump off, and in jumping got under the car and was hurt. In Flower *vs.* Pa. R. Co., 67 Pa. St., 210, a boy who was injured climbed on a tender, and rolled off when it started. In Duff *vs.* R.

Co., 91 Pa. St., 458, a boy who was selling papers on a train was injured—just how does not appear. In R. Co. *vs.* Schwindling, 102 Pa. St., 258, the boy who was injured was loitering on the platform of a station, watching trains go by. In McMullen *vs.* R. Co., 132 Pa. St., 107, the boy who was injured was lying on the tracks between two cars, which were coupled together. In Cauley *vs.* R. Co., 95 Pa. St., 398, the child whose injuries were the subject-matter of the action had been playing on the cars, and when jumping off, pursuant to the order to that effect, he fell under the car and was hurt; and in Beers *vs.* R. Co., 19 Conn., 566, cattle which had strayed on the track were injured.

It would seem that if this court is to be asked to revise its well-settled decisions upon the authority of cases in State courts, counsel should be able to refer it to cases in those courts, the facts of which approach a little more closely those upon which this court rendered the decisions which were followed by the courts below in the case at bar.

A. S. WORTHINGTON,
Attorney for the Defendant in Error.

BALTIMORE & POTOMAC RAILROAD COMPANY *v.* CUMBERLAND.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 87. Argued December 19, 1899. — Decided February 5, 1900.

Under a regulation requiring railroad tracks running through the streets of a city to be fenced, whenever the grade is "approximately even" with the adjacent surface of the streets, it is proper for the jury to say whether a track elevated two feet two inches above the surface of the street, is within the regulation.

Where the declaration averred that there was "no light" upon the engine to indicate its approach, and the proof was that an insufficient light was carried, it was held that there was no material variance.

Where the regulation required that "a headlight, or other equivalent reflecting lantern," should be carried upon a train to indicate its approach, it is for the jury to say whether an ordinary hand-lantern is a substantial compliance with the regulation.

In determining the existence of contributory negligence, the plaintiff is not liable for faults which arise from inherent mental or physical defects, or want of capacity to appreciate what is and what is not negligence. He is only responsible for the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger.

While under the circumstances of this case the court might have held the plaintiff liable for contributory negligence, if he had been a man of mature age and average intelligence, as he was a boy of twelve years of age, it was held that the question was properly submitted to the jury.

A person crossing the track of a railroad company in the streets of a city for the more convenient performance of his duties is not *ipso facto* a trespasser.

This was an action begun in the Supreme Court of the District of Columbia by the plaintiff Cumberland, suing by his next friend, against the Baltimore and Potomac Railroad Company, to recover damages for personal injuries inflicted upon him by the alleged negligence of the defendant company.

The undisputed facts were that the plaintiff, who was twelve years and four months of age at the time of the accident, was a street lamplighter by occupation, and for more than a year prior thereto had been engaged, under his father's direction,

in lighting street lamps in the vicinity of the company's tracks on Maryland avenue in the city of Washington.

The accident occurred about dark on the evening of December 10, 1894. The weather was misty, according to some of the witnesses; rainy, foggy and very cold, according to others. The plaintiff, having lighted a lamp on the south side of Maryland avenue, between Thirteenth-and-a-half and Fourteenth streets, started across Maryland avenue and the tracks of the company, for the purpose of lighting a lamp directly opposite on the north side of the street. There was a curve in the tracks at this point, made by a turn in the railroad from Long Bridge into Maryland avenue. There was no crossing for persons or vehicles between Thirteenth-and-a-half and Fourteenth streets, and the street on either side of the right of way was separated therefrom by curbs which projected eight inches above the adjacent roadway. These curbs were about five feet from the outer rails on either side, and the tracks were carried upon ties, elevated about eighteen inches above the level of the curbs and about two feet higher than the surface of the street. The plaintiff, having lighted a lamp on the south side, started across the street; mounted the elevated roadway, in front of a train coming up from Long Bridge with the tender ahead of the engine, and just as he stepped upon the track, was struck by the tender, knocked down and run over. There was a hand signal lantern swung on the advancing end of the tender, and at the time of the accident it appeared to have been burning.

At this part of the avenue there are four or five railway tracks — two main tracks on the north side, used for passenger trains; a third to the south of these two, used for freight trains, which was the one on which the accident occurred; south of that a track diverging eastwardly into the freight station of the Richmond and Danville Railroad Company to the south of the avenue; and still further south, and south even of the gas lamp which the boy had lit, a switch diverging from the east into a private coal yard. About the place of the accident, and thence westward towards Fourteenth street, the tracks begin a curve so as to reach the Long Bridge

at the foot of that street, and to the south, upon the inner side of this curve and about the line of Fourteenth street, there was a switchman's box, which to some slight extent obstructed the view from the east of trains coming to the avenue from the bridge.

As the boy had passed or was passing the Richmond and Danville track, and was approaching the freight track, his attention was directed to a passenger train going out on the northernmost track towards the bridge. When this had passed he proceeded on his way across, and having stepped on the freight track, he was struck, knocked down and injured by the tender attached to an engine drawing the work train, which he states he had not seen, although he testifies that he had looked in that direction, had listened for approaching trains, and had neither seen nor heard any.

The engineer testified that, when he was between Fourteenth street and the place where the accident happened, he saw the form of a person moving at a brisk walk in the direction of the tracks, about fifteen feet away from them and about fifty or sixty feet in front of the train. He could not tell whether it was a man or boy. When in the neighborhood of thirty feet away, he saw he was coming so near the track that he thought probably he was going to walk on it. He then reversed the engine, applied the brake to stop, and the train was brought to a standstill within the distance of eighty or ninety feet.

The fireman testified that when he first saw the boy he was approaching the track at a brisk walk, and was about fifteen or twenty feet from it, making his way north. He appeared to be looking across towards the moving train on the southbound main track. He was carrying some object (a ladder). He saw him put his foot on the end of the ties, and he (witness) called the engineer's attention by "hollering."

The defence rested chiefly upon the contributory negligence of the plaintiff in crossing the track at this point without sufficient care in looking out for the approach of trains.

The trial resulted in a verdict for the plaintiff in the sum of $8000, upon which judgment was entered. The case was car-

ried by the defendant to the Court of Appeals, and the judgment of the Supreme Court affirmed. 12 D. C. App. 598. Whereupon defendant sued out a writ of error from this court.

Mr. Frederic D. McKenney and *Mr. Wayne MacVeagh* for plaintiff in error. *Mr. John Spalding Flannery* was on their brief.

Mr. A. S. Worthington for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

Upon the trial the court left it to the jury to say whether the defendant was guilty of negligence in either of four particulars: (1) In failing to protect the tracks by a fence at the point where the accident occurred; (2) in failing to provide a proper light to give warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff and before it was brought to a stop, as bearing upon the question of speed; (4) and whether the persons in charge of the engine were keeping a proper lookout. These questions were all left to the jury, and presumptively, at least, determined against the defendant.

1. The regulations of the Commissioners of the District, adopted in pursuance of an act of Congress, approved January 26, 1887, c. 48, 24 Stat. 368, and a joint resolution of February 26, 1892, 27 Stat. 394, require that "whenever the grade of a steam railroad track is approximately even with the adjacent surface, the line of the road shall be securely closed on both sides with a substantial fence," etc. There was no fence upon either side of the track where the accident occurred. The facts were that the track, at the point where the plaintiff was attempting to cross at the time of the accident, was not over two feet two inches higher than the level of the street, and was probably considerably less than that. The argument of the defendant is that, under this state of facts, the court had no right to submit the question to the jury, whether, within the meaning

of the regulations, the grade of the track at this point was "approximately even with the adjacent surface" of the street. There was also some testimony tending to show that it was impracticable to build a fence there consistently with the proper management of the road.

Had the sole design of the fence been to prevent the crossing of vehicles at this point, it would be difficult to say that an elevation of two feet two inches above the surface of the street made the track approximately even with the adjacent surface; but evidently more than this was contemplated by this regulation, which looked to the protection of pedestrians as well as vehicles. The object of the fence is to prevent all crossing of the tracks, and unless the elevation be such as to render it practically impossible to cross, it is a question for the jury whether the track is not approximately even with the surface of the street. An elevation of two feet would afford no serious obstacle to the crossing of foot passengers, and apparently presented no difficulty to the plaintiff, as he had already mounted the track when he was struck by the tender. Had there been a fence upon either side of the track between Thirteenth-and-a-half and Fourteenth streets, the plaintiff would have been obliged to cross the track at one of the street crossings, in order to reach the lamp which he intended to light, and the accident would probably not have occurred. As bearing upon the practicability of a fence at this point, it is pertinent to note that, after the accident occurred, a fence was erected along the north side of the track between these two streets, and still remains there. It was proper to leave the question of the fence to the jury, and we have no criticism to make of the charge upon that point.

2. It is also insisted that there was a material variance between the declaration and the proof with respect to the light on the advancing end of the tender, and, hence that the sufficiency of such light was improperly submitted to the jury. The regulations of the Commissioners require that "between sunset and sunrise of each day, a headlight, or other equivalent reflecting lantern, to give due warning to persons near or crossing steam railroad tracks of the approach of

trains, locomotives or cars, shall be displayed upon the advancing end of every train of steam railroad cars, and of single steam railroad cars and locomotives not in trains, in the District of Columbia. It shall be unlawful for any person to set in motion, or run, or operate, any train of railroad cars, single railroad cars, or locomotives, without the said display of such lights or lanterns."

The declaration averred that "there was no light upon the rear part of said engine to indicate its approach," and that "by reason of the reckless and grossly careless manner in which the agents of said defendant operated said engine in failing to place any light upon the rear part of said engine," plaintiff was injured. The plaintiff showed that there was no regular headlight on the tender, but that there was a signal lantern hanging on a hook on the rear or advancing end of the tender, and that such light was visible at a considerable distance.

The court left it to the jury to say whether the light was substantially such an one as was required by the regulations, or such as was requisite to give proper warning of the approach of the train.

As the light was clearly not an ordinary headlight, or other equivalent reflecting lantern, shedding a dazzling light which could scarcely fail to be noticed by a person crossing in front of an engine, but an ordinary lantern which might readily be mistaken for a lantern carried by a foot passenger, or even a street lamp or other smaller light, it is impossible to say that there was error in submitting the question of the sufficiency of the light to the jury. The averment of the declaration, that there was *no* light, is satisfied by proof that there was no such light as was required by law. An insufficient light is, from a legal point of view, no light at all. The distinction between a powerful headlight, such as is ordinarily carried upon locomotives, and an ordinary lantern, is by no means a fanciful or immaterial one; and it would unquestionably have been error to refuse to submit to the jury the question whether the light in question was such as gave sufficient warning to persons of the approach of trains. Although the regulations

of the Commissioners are satisfied not only by a locomotive headlight, but by an equivalent reflecting lantern of sufficient power to give warning that a train of steam cars is approaching, it was at least a question for the jury whether an ordinary lantern which railway employés carry in their hands answered the requirement. It is very clear that the variance between the declaration and the proof was not of a character to mislead the defendant at the trial. *Nash* v. *Towne*, 5 Wall. 689, 700; *Robbins* v. *Chicago*, 4 Wall. 657; *Grayson* v. *Lynch*, 163 U. S. 468, 476.

3. The case turned mainly, however, upon the question of contributory negligence, and upon the refusal of the court to direct a verdict for the defendant upon that ground. The defence of contributory negligence is one which admits, or at least presupposes, negligence on the part of the defendant, and the party in fault thereby seeks to cast upon the plaintiff the consequence of his own failure to observe the precautions which the circumstances of the case demanded. In determining the existence of such negligence, we are not to hold the plaintiff liable for faults which arise from inherent physical or mental defects, or want of capacity to appreciate what is and what is not negligence, but only to hold him to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger. The defendant is primarily liable for his own negligence, and can only escape liability for a non-observance of such precautions as his observation or the experience of others teaches him to be necessary, by proving that the accident would not have occurred if the plaintiff had taken such precautions as his own observation and experience had taught him to be necessary. Hence the plaintiff is liable only for the proper use of his own faculties, and what may be justly held to be contributory negligence in one is not necessarily such in another. There is no hard and fast rule applicable to every one under like circumstances. To an adult, in full possession of his mental and physical powers, one standard may be applied; to a boy, particularly if he be of limited intelligence, another standard; and to an infant not *sui juris* and totally ignorant of danger, still

another. *Railroad Co.* v. *Gladmon*, 15 Wall. 401; *Railroad Co.* v. *Stout*, 17 Wall. 657; *Union Pacific Railway* v. *McDonald*, 152 U. S. 262, 281. Indeed in the last case the only contributory negligence with which he is chargeable is that of his parent or custodian who permits him to stroll into a place of danger.

Had the plaintiff in this case been a man of mature age and average intelligence, it would be difficult to escape the conclusion that he was guilty of negligence in crossing this track without taking more careful observations of incoming and outgoing trains. But he was not. He was a boy of twelve years, apparently dull for his age, as he had attended school four or five years without having learned to read or write. There was testimony tending to show that he had only the capacity of a child of six or seven. Certain answers given by him upon his examination indicated that his powers of observation were limited or his memory defective. He was employed by his father, who was a city lamplighter, to light about thirty lamps upon or near Maryland avenue; had started shortly before five o'clock on the evening in question, which was dark and misty, to make his accustomed rounds, and had just lighted a lamp on the south side of the avenue, when he started across to light a lamp on the north side, almost immediately opposite the one he had just lighted. He says he looked both ways, up and down Maryland avenue, for trains, waited for the passing of an outgoing passenger train, but failed to notice an incoming train which was being drawn by a locomotive running backward. The light on the tender was obviously not powerful enough to illuminate the tracks in front of the locomotive, since the engineer and fireman, who were looking at him as he stepped on the track in front of the locomotive, could not tell whether he was a man, woman, boy or girl, and could not see the ladder he carried. It is probable that he was somewhat confused by the noise of the outgoing train, by the ringing of the engine bell, and by a number of vehicles which had just come over the bridge from the Virginia side, and were rumbling and rattling over the cobblestone pavement. It may be that these noises prevented

his hearing the shouting of the engineer and fireman, and of two men at a switch lower down the track toward the bridge, who were calling to him to keep away. It is by no means improbable that, if there had been a strong reflecting light on the tender, as the regulations required, it would have compelled his attention, when an ordinary signal lantern might easily pass unnoticed. Indeed, a witness who was standing on the corner of Thirteenth-and-a-half street and Maryland avenue, and saw the plaintiff going from the lamp toward the railroad track, saw no train coming up from the bridge, although he was looking in that direction.

We do not think that under these circumstances plaintiff could be considered a trespasser in crossing the tracks. This term is doubtless applicable to those who unnecessarily loiter upon, or walk along, a railway track as a convenient path. But to say that the plaintiff, who was lighting lamps on both sides of Maryland avenue, was bound every time he crossed the track to do so at a street crossing, is to apply too stringent a rule. The lamp which he had lighted and the one which he had started to light were upon opposite sides of the street, at a distance of from 100 to 150 feet from the crossing of Thirteenth-and-a-half street. The rule contended for would require the plaintiff, after having lighted the lamp on the south side, to return to Thirteenth-and-a-half street, cross the avenue at that point, and then go about half a block to a point opposite the other, nearly double the distance required to cross the tracks directly. This method would have to be repeated every time he had occasion to cross the avenue. Of course, if a fence had been built this would have been necessary, but in the absence of such fence we do not think that the mere crossing of the track in the convenient performance of his duties made him a trespasser *per se*. We have examined the many cases cited by the plaintiff in error upon this point, and find that nearly all of them either turned upon the question whether loitering upon, playing upon or walking along a railroad track made a person a trespasser, or, whether in crossing a track, sufficient care was used to avoid approaching trains. We are not prepared to give our adherence to the

doctrine announced in a very few cases, that a man who steps his foot upon a railroad track, except at a crossing, does so at his peril, though such doctrine when applied to the facts of the particular case may not have been an unjust one. We are rather disposed to say that, where tracks are laid through the streets of a city, upon or substantially upon the level of the street, a person is not limited in crossing such tracks to the regular street crossings, but may cross them at any point between such streets in the convenient performance of his daily duties. We cannot say that there was such danger to an active boy crossing the track at this point as to authorize the case to be taken from the jury upon the ground that he was *ipso facto* a trespasser.

We have no desire to limit or qualify anything said by us in *Railroad Company* v. *Houston*, 95 U. S. 697, or in *Northern Pacific Railroad* v. *Freeman*, 174 U. S. 379, both of which involved the question of care at a regular highway crossing, and we have no doubt that in the case under consideration such care should have been used as the nature of the case required, and the intellectual capacity of the plaintiff admitted. But these were all questions for the jury, and were conclusively answered by the verdict. We cannot say that the court should have taken the case from the jury, or that it erred in any material particular. We cannot even say that we should have come to a different conclusion upon the facts.

The judgment of the Court of Appeals was right, and it is therefore

Affirmed.

Mr. Justice White and Mr. Justice McKenna dissented.